124 — 400

TRANSCRIPT OF RECORD. 629

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 89.

ALBERT C. WIDDICOMBE, PLAINTIFF IN ERROR,

vs.

OLIVER P. CHILDERS, LUCRETIA JUNGHER, SALLIE F. JOHNSTON, AND H. WILL JOHNSTON, HER HUSBAND.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED OCTOBER 11, 1884.

accession 20855

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

{ Seal of the United States Circuit Court for the Western District of Missouri, Eastern Division. }

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court of the State of Missouri before you, at the October term, 1883, thereof, between Albert C. Widdicombe, plaintiff, and Oliver P. Childers, Lucretia Jungher, Sallie F. Johnston, and H. Will Johnston, her husband, defendants, a manifest error hath happened, to the great damage of the said Albert C. Widdicombe, plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this thirteenth day of February, in the year of our Lord one thousand eight hundred and eighty-four.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, dated as aforesaid.

H. C. GEISBERG,
Clerk Circuit Court of the United States, Western District of Missouri.

Allowed by—

WARWICK HOUGH,
Chief Justice of the Supreme Court of Missouri.

b *Return to Writ.*

STATE OF MISSOURI, } *ss:*
County of Cole, }

In obedience of the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

l witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 22d day of September, A. D. 1884.

[Seal of the Supreme Court of Missouri.]

HENRY W. EWING, *Clerk*,
By E. B. EWING, *D. C.*

[Endorsed:] No. —. United States circuit court, western district of Missouri. A. C. Widdicombe *vs.* Oliver P. Childers *et al.* Writ of error to the supreme court of the State of Missouri. Returned and filed — day ——, 187–. —— ——, clerk.

c The United States of America to Oliver P. Childers, Lucretia Jungher, Sallie F. Johnston, and H. Will Johnston, her husband, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein Albert C. Widdicombe is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Warwick Hough, chief justice of the supreme court of the State of Missouri, this thirteenth day of February, in the year of our Lord one thousand eight hundred and eighty-four.

WARWICK HOUGH,
Chief Justice Sup. C't Mo.

d UNITED STATES OF AMERICA, *Western District of Missouri.* } *ss:*

I hereby acknowledge due service of the within citation this 21st day of February, A. D. 1884.

JAMES HAGERMAN,
Attorney for Defendant in Error.

[Endorsed:] United States — court, western district of Missouri. A. C. Widdicombe *vs.* Oliver P. Childers *et al.* Citation. Filed ——, 187–. —— ——, clerk.

e STATE OF MISSOURI, *Sct:*

Be it remembered that heretofore, to wit, on the 28th day of August, A. D. 1878, there was filed in the office of the clerk of the supreme court of the State of Missouri a transcript, which is in the words and figures as follows, to wit:

f THE STATE OF MISSOURI, *ss:*

The State of Missouri to the judge of the sixteenth judicial circuit in said State, Greeting:

Whereas in the record and proceedings in a certain cause lately pending in the circuit court of Marion county, wherein Albert C. Widdicombe was plaintiff and Oliver P. Childers, Lucretia Jungher, Sallie F. Johnston, and H. Will Johnston, her husband, were defendants in a civil action, manifest error hath intervened to the great damage of the said plaintiff, as by his complaint we are informed.

Now, we being willing that the error, if any there be, should be corrected and full and speedy justice done to the parties aforesaid, in that behalf command you that you send to us, certified under your seal, the record and proceedings in the cause aforesaid as fully as the same remain of record before you in said court, so that we may have them before us at our supreme court, to be begun and held at the city of Jefferson, in the county of Cole, in said State, on the third Tuesday in April next, so that our judges of our supreme court, on inspecting the record and proceedings aforesaid, may cause to be further done therein for correcting the error what of right and according to law ought to be done, and have you then and there this writ.

Witness Henry W. Ewing, clerk of our said supreme court at office, in the city of Jefferson, the 21st day of November, in the year of our Lord, one thousand eight hundred and seventy-seven.

[SEAL.] HENRY W. EWING, *Clerk.*
By CHAS. G. GUENTHER, *D. C.*

g STATE OF MISSOURI, } *ss:*
County of Marion, }

I, Joseph H. Donley, clerk of the circuit court within and for the county aforesaid, in obedience to the mandate of the within writ, herewith transmit to the honorable supreme court of the State of Missouri, a full, true, and complete transcript of the record and proceedings in the within-entitled cause, as fully as the same remain of record in my office.

In testimony whereof I hereto set my hand and affix the seal of said court at office, in the city of Palmyra, Mo., this 30th day of July, 1878.

[SEAL.] JOSEPH H. DONLEY, *Clerk.*

Error to Marion Circuit Court.

ALBERT C. WIDDICOMBE, P. E. *vs.* OLIVER P. CHILDERS, LUCRETIA Jungher, Sallie F. Johnston, and H. Will Johnston, Her Husband, D. E.

Now, at this day, it appearing to the satisfaction of the court upon an inspection of the record of the Marion county circuit court in the case of Albert C. Widdicombe, plaintiff in error, *vs.* Oliver P.

Childers *et. al.*, defendants in error, that there is error therein and that the said A. C. Widdicombe, the plaintiff in error as principal, and F. W. Ludwig and W. W. Taliaferro, as sureties, have entered into a cognizance to the said Oliver P. Childers *et al.*, the defendants in error, as required by section 15 of article 13 of chapter 110 of Wagner's Missouri statute, the same being now approved by this court, it is ordered by the court that the writ of error issued in this cause on the 21st day of November, 1877, out of this court stay all further proceedings on the judgment of said Marion county circuit court in this cause, until this cause can be heard and passed upon by this court.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court. Done at office, in the city of Jefferson, this the 17th day of March, 1879.

[SEAL.] HENRY W. EWING,
Cl'k Sup. C't.
By CHARLES G. GUENTHER, *D. C.*

1 STATE OF MISSOURI, } *ss:*
County of Marion, }

Be it remembered that heretofore, to wit, on the 8th day of December, A. D. 1876, there was filed in the office of the clerk of the circuit court in and for the county of Marion and State of Missouri, a transcript from the clerk of the circuit court of Clark county, Missouri, wherein Albert C. Widdicombe is plaintiff and Oliver P. Childres is complainant, which said transcript is in words and figures following, to wit:

STATE OF MISSOURI, } *ss:*
County of Clark, }

Be it remembered that on the 25th day of August, 1874, there was filed in the office of the clerk of the circuit court for said county a petition as follows, to wit:

Petition.

In Clark County Circuit Court, October Term, 1874.

ALBERT C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDRESS, Def't.

Pl'ff states that on the first day of January, 1872, he was entitled to the possession of the southeast fourth of section thirty-six, in township sixty-four, of range six, in Clark county, Missouri, and, being so entitled to the possession thereof, that the def't afterwards, on the 1st day of March, 1872, entered into such premises and unlawfully withholds from the pl'ff the possession thereof, to his damage
2 in the sum of one thousand dollars. Wherefore pl'ff prays judgment for the recovery of the premises and one thousand dollars damages for the unlawful withholding of the same from the pl'ff, and twenty-five dollars, which pl'ff states is the monthly value of the rents and profits of the premises for monthly rents and profits

from the rendition of judgment until the possession of the premises is delivered to pl'ff, and for other proper relief.

GIVENS & McKEE,
Att'ys for Pl'ff.

Afterwards, to wit, on the 26th day of August, 1874, a writ of summons was issued from the office of said clerk, as follows:

Writ of Summons.

STATE OF MISSOURI, } ss:
County of Clark, }

The State of Missouri to the sheriff of Clark county, Greeting:

We command you to summon Oliver Childress, if he be found in your county, to appear before our circuit court to be holden in and for the county of Clark, at the court-house in the town of Kahoka, in said county, on the first day of the next term thereof, to be begun and held on the first Monday in October next, A. D. 1874, then and there, before the judge of our said court, to answer the petition of Albert C. Widdicombe (a certified copy of which said petition is hereunto annexed), and have you then and there this writ, the return of your action thereupon.

Witness my hand as clerk of our said — and the seal thereof.

3 Done at office, in Kahoka, in the county aforesaid, on the 26th day of August, A. D. 1874.

[SEAL.] SAMUEL SPANGLER, *Clerk.*

Which said writ was delivered to the sheriff of Clark Co., and by him returned with the following endorsement thereon, to wit:

Sheriff's Return.

Executed the within writ in the county of Clark on the 19th day of Sept., A. D. 1874, by leaving a copy of the within writ & petition at the usual place of abode of O. P. Childers with a member of the family, a white person over the age of 16 years.

S. F. SACKET, *Sheriff.*
By CHARLES BARNETT, *Deputy.*

Afterwards, to wit, at the October term, 1874, of said Clark circuit court, and on the 13th day of said month, the following proceedings were had, to wit:

A. C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDERS, Def't.

Ejectment.

At this day comes said parties, by attorney, and, on motion of def't, leave is given him to file his answer herein 60 days before next term.

And afterwards at the April term, 1875, of said court, and on the 12th day of said month, the following proceedings were had, to wit:

4 A. C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDERS, Def't.

Ejectment.

At this day comes said parties, by their respective attorneys, and, by consent of pl'ff, def't files his answer herein.

Said answer being in words and figures, as follows, to wit:

Answer.

A. C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDERS, Defendant.

Defendant denies that the plaintiff was, on the 1st day of January, 1872, entitled to the possession of the land described in the petition. Denies that he unlawfully withholds the possession from plaintiff, to his damage in the sum of one thousand dollars or any other sum. Denies that the monthly value of the rents and profits of said premises is twenty-five dollars. Denies that he unlawfully entered upon said premises.

Wherefore defendant asks to be dismissed with costs.

JAMES HAGERMAN,
Attorney for Defendant.

Afterwards at said April term, 1875, of said court, and on the 20th day of said month, the following proceedings were had, to wit:

5 ALBERT C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDRES, Def't.

Ejectment.

At this day come the said parties, by their respective attorneys, and on motion of defendant leave is given him to file his amended answer herein 60 days before the next term of this court, until which term this cause is continued.

Afterwards, to wit, at the October term, 1875, of said court, and on the 11th day of said month, the following proceedings were had, to wit:

Judg't.

ALBERT C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDERS, Def't.

Ejectment.

At this day come said parties, by their respective attorneys, and, this cause coming on to be heard is submitted to the court; and the court finds by the agreement of parties herein that the said plaintiff is entitled to the possession of the southeast fourth of section thirty-six, t'p 64, range 6, in Clark county, Mo. Thereupon it is considered and adjudged by the court that the said plaintiff do have & recover of and from the said defendants the possession of said lands; and it is further ordered that execution issue to restore said pl'ff the possession of said land, together with costs of suit.

6 At said October term of said court, and on the 12th day of said month, the following proceedings were had, to wit:

Order to Set Aside Judg't.

ALBERT C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDERS, Def't.

Ordered by the court, on its own motion, that the judgment heretofore rendered in this cause be, and the same is hereby, set aside.

At said October term of said court, and on the 15th day of said month, the following proceedings were had, to wit:

ALBERT C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDERS, Def't.

At this day comes said pl'ff and files motion for change of venue herein.

Said motion being in words and figures, as follows, to wit:

Motion for Change of Venue.

A. C. WIDDICOMBE, Pl'ff, *vs.* O. P. CHILDERS, Def't.

The plaintiff in the above-entitled cause makes affidavit and say that he, the said A. C. Widdicombe, as plaintiff aforesaid, has good cause and does believe the judge of the circuit court of Clark
7 Co., Mo., is prejudiced against him to that extent that he cannot impartially sit in said cause, and that he cannot have a fair trial before the said judge.

A. C. WIDDICOMBE, *Pl'ff.*

Sworn & subscribed to this 14th October, 1875.

D. N. LAPSLEY, *C'lk.*

At said October term, 1875, of said court, and on the 18th day of said month, the following proceedings were had, to wit:

Order for Change of Venue.

ALBERT C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDERS, Def't.

Ejectment.

At this day come the said parties by their respective attorneys, and the motion heretofore filed for a change of venue in this cause coming on to be heard, is submitted to the court, and the court, after due consideration, doth sustain said application, and order that the venue of this cause be changed to Marion county, Missouri; and it is further ordered that the clerk of this court make out and transmit to the clerk of the circuit court of said county of Marion a full, true, and complete transcript of the record and proceedings had in this court, in relation to this cause, as the same remains of record and on file in his said office.

Certificate.

STATE OF MISSOURI, } ss:
County Clark, }

I, D. N. Lampsley, clerk of the circuit court for said county,
8 certify the foregoing to be a full, true & complete transcript of the record & proceedings had in this court, in the cause entitled A. C. Widdicombe *vs.* Oliver Childers, as the same appear of record in my office.

Witness my hand, as clerk, and seal of said court.

Done at office, in Kahoka, November 24th, 1875.

[SEAL.] D. N. LAPSLEY, *Clerk.*
By WIRT MORRIS, *D. C.*

Costs.

To Samuel Spangler, clerk	4 60
" S. F. Sacket, sheriff	1 15
" D. N. Lapsley, clerk	6 30
" Samuel Frazer, sheriff	50

Attest: D. N. LAPSLEY, *Cl'k.*

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STATE OF MISSOURI, } ss:
9 *County of Marion,* }

Be it remembered that heretofore, to wit, at a circuit court continued and held at the court-house, in the city of Palmyra, Marion county, Missouri, before the Honorable John T. Redd, judge of the 16th judicial circuit of the State of Missouri and judge of this court, and on the 3rd day of March, being the fifth of the regular February term of said court, A. D. 1876, the following among other proceedings were had, to wit:

Filing of Def'ts Motion.

ALBERT C. WIDDERCOMBE, Pl'ff, *vs.* OLIVER CHILDRESS, Def't.

At this day come Lucretia Jungher, Sally F. Johnston, and H. Will Johnston, by their attorney, and file motion to become parties defendants in this cause.

Which said motion is in words and figures, as follows, to wit:

STATE OF MISSOURI, } ss:
County of Marion. }

Motion.

ALBERT C. WIDDICOMBE, Plaintiff,

vs.

OLIVER P. CHILDRESS, Defendant.

In the Circuit Court. Feb'y Term, 1876.

10 Now comes Lucretia Jugher, Sally F. Johnston, and H. Will Johnston, and shows to the court that they are the heirs-at-law as widow & children of Theodore Jungher, who died seized of the lands in this action sought to be recovered, and that since his death they have conveyed by deed of general warranty said lands to one John W. McKee and one Samuel McKee, and the defendant, Oliver P. Childress, is a tenant under them of a part of said lands; that they are responsible to said McKey on their warranty if they should be dispossessed of said premises, and are therefore affected by and deeply interested in the event of said suit; wherefore they ask to be made parties hereto and for leave to file their answer and defend said cause.

HAYGERMAN, ANDERSON AND BOULWARE,
For Def'ts.

And afterwards, to wit, at a circuit court continued and held as aforesaid, before the Honorable John T. Redd, judge as aforesaid; and on the 4th day of March, A. D. 1876, the following among other proceedings, were had, to wit:

Motion Sust'd. Filing of Def'ts' Answer.

ALBERT C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDRESS, Def't.

At this day come the parties herein, by their attorneys, and the motion of Lucretia Jungher, Sally F. Johnston, and H. W. Johnston, to be made parties defendant in this cause, now
11 coming on to be heard, being seen and duly considered, is by the court sustained; whereupon leave is given by the court to the said Lucretia Jungher, Sallie F. Johnston, and H. Will Johnston to file answer on or before Monday, the 6th instant, at 10 o'clock a. m., in this cause. Whereupon comes said defendants by attorneys and files answer in this cause.

Which said answer is in words and figures following, to wit:

Certificate.

STATE OF MISSOURI, } ss:
County Clark, }

I, D. N. Lampsley, clerk of the circuit court for said county,
8 certify the foregoing to be a full, true & complete transcript of the record & proceedings had in this court, in the cause entitled A. C. Widdicombe *vs.* Oliver Childers, as the same appear of record in my office.

Witness my hand, as clerk, and seal of said court.

Done at office, in Kahoka, November 24th, 1875.

[SEAL.] D. N. LAPSLEY, *Clerk.*
By WIRT MORRIS, *D. C.*

Costs.

To Samuel Spangler, clerk	4 60
" S. F. Sacket, sheriff	1 15
" D. N. Lapsley, clerk	6 30
" Samuel Frazer, sheriff	50

Attest: D. N. LAPSLEY, *Cl'k.*

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STATE OF MISSOURI, } ss:
9 *County of Marion,* }

Be it remembered that heretofore, to wit, at a circuit court continued and held at the court-house, in the city of Palmyra, Marion county, Missouri, before the Honorable John T. Redd, judge of the 16th judicial circuit of the State of Missouri and judge of this court, and on the 3rd day of March, being the fifth of the regular February term of said court, A. D. 1876, the following among other proceedings were had, to wit:

Filing of Def'ts Motion.

ALBERT C. WIDDERCOMBE, Pl'ff, *vs.* OLIVER CHILDRESS, Def't.

At this day come Lucretia Jungher, Sally F. Johnston, and H. Will Johnston, by their attorney, and file motion to become parties defendants in this cause.

Which said motion is in words and figures, as follows, to wit:

STATE OF MISSOURI, } ss:
County of Marion. }

Motion.

ALBERT C. WIDDICOMBE, Plaintiff,

vs.

OLIVER P. CHILDRESS, Defendant.

In the Circuit Court. Feb'y Term, 1876.

10 Now comes Lucretia Jugher, Sally F. Johnston, and H. Will Johnston, and shows to the court that they are the heirs-at-law as widow & children of Theodore Jungher, who died seized of the lands in this action sought to be recovered, and that since his death they have conveyed by deed of general warranty said lands to one John W. McKee and one Samuel McKee, and the defendant, Oliver P. Childress, is a tenant under them of a part of said lands; that they are responsible to said McKey on their warranty if they should be dispossessed of said premises, and are therefore affected by and deeply interested in the event of said suit; wherefore they ask to be made parties hereto and for leave to file their answer and defend said cause.

HAYGERMAN, ANDERSON AND BOULWARE,
For Def'ts.

And afterwards, to wit, at a circuit court continued and held as aforesaid, before the Honorable John T. Redd, judge as aforesaid; and on the 4th day of March, A. D. 1876, the following among other proceedings, were had, to wit:

Motion Sust'd. Filing of Def'ts' Answer.

ALBERT C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDRESS, Def't.

At this day come the parties herein, by their attorneys, and the motion of Lucretia Jungher, Sally F. Johnston, and H. W. Johnston, to be made parties defendant in this cause, now
11 coming on to be heard, being seen and duly considered, is by the court sustained; whereupon leave is given by the court to the said Lucretia Jungher, Sallie F. Johnston, and H. Will Johnston to file answer on or before Monday, the 6th instant, at 10 o'clock a. m., in this cause. Whereupon comes said defendants by attorneys and files answer in this cause.

Which said answer is in words and figures following, to wit:

Separate Answer of Lucretia A. Jungher, Sallie F. Johnston, and H. W. Johnston.

In the Circuit Court of Marion County, Mo. February Term, A. D. 1876.

A. C. WIDDICOMBE, Plaintiff,

vs.

O. P. CHILDERS, LUCRETIA A. JUNGHER, SALLIE F. JOHNSTON, and H. WILL JOHNSTON, her husband, Defendant.

The defendant-, Lucretia A. Jungher, Sallie F. Johnston, and H. Will Johnston, who, upon their own motion, have been made defendants in this cause by order of this court for their separate answer to the petition of the plaintiff, state:

These defendants deny that the plaintiff was or is entitled to the possession of the land described in the petition as alleged; deny that the defendant, O. P. Childers, wrongfully entered upon
12 said land, as alleged; deny that the defendant, O. P. Childers, was, at the institution of this suit or at any time before or since or is now in the possession of the whole of said land, and expressly avers that the said defendant, Childers, either at the institution of this suit, or at any time before or since, has not been in possession of any part of said land except $14\frac{82}{100}$ acres of said land, as hereinafter more particularly described. That the defendant, Lucretia A. Jungher, is the widow, and the defendant, Sallie F. Johnstone, is the heir and only heir-at-law of Theodore Jungher, deceased, and the defendant, H. W. Johnstone, is the husband of the said defendant, Sallie F. Johnstone.

That heretofore, prior to the institution of this suit, the said Theodore Jungher died seized of the possession and title to the land described in plaintiff's petition, namely: The southeast quarter of section thirty-six (36), township sixty-four (64) north, range six (6) west, in the county of Clark, in the State of Missouri.

That prior to the institution of this suit these defendants conveyed the land aforesaid by deed, with covenants of warranty, to John W. McKee and Sam'l McKee, who thereupon entered upon and took the possession of said land. That prior to the institution of this suit the said John W. McKee and Samuel McKee
13 leased, by verbal contract, a small portion of said land—about $14\frac{82}{100}$ acres—to the defendant, O. P. Childers, who was at the institution of this suit, and has been ever since and is now, in possession of said $14\frac{82}{100}$ acres, as the tenant of the said John W. McKee and Samuel McKee or those claiming under them.

That should the plaintiff recover in this action then these defendants would be liable to said McKee for the breach of the covenants of warranty in their deed to said McKee, and the said McKees have called upon these defendants to defend this suit, and hence their interest in the proper defence of this suit.

These defendants state that the $14\frac{82}{100}$ acres of the land aforesaid, which, as is admitted, was and is in the possession of the defendant,

O. P. Childers, is that part of said quarter section lying in the south part thereof, west of Fox slough, and which was and is enclosed by a certain fence built by said defendant, O. P. Childers.

That all of the said quarter section, except the said $14\frac{82}{100}$ acres so enclosed as aforesaid was at the commencement of this suit, and has been ever since and is now in the possession of the said McKee or those claiming under them.

These defendants state that neither the plaintiff, nor his ancestor, nor his predecessor, nor his grantor, nor other person under whom he claims was seized or possessed of the premises in question within ten years before the commencement of this action, and therefore cannot recover in this action.

These defendants further state that for more than thirty years next immediately preceding the commencement of this action the said defendant, O. P. Childers, the said McKee and those under whom they claim, were in possession of the said premises as heretofore stated; that such possession was during all said time open, notorious, continuous, uninterrupted, and adverse to the plaintiff, and those under whom he claims and the plaintiff cannot recover in this action.

14 These defendants for equitable answer to the alleged cause of action of the plaintiff show:

That prior to the 30th day of August, 1838, Edward Jenner Smith purchased and intended to so purchase the said S. E. qr. of section 36, township 64, range 6 west, in the district of lands subject to sale at Palmyra, Missouri, from the United States of America, and paid the purchase price therefor and at same time purchased 400 acres of other lands from the United States, in said township and range.

That afterwards, on the 30th day of August, 1838, the United States of America attempted to convey by patent the land so purchased to said Edward Jenner Smith, but by mistake in said patent the said southeast quarter is not properly described, but instead the southwest quarter of said section 36, township 64, range 6 west, is described in said patent.

These defendants show that the United States of America intended to convey said S. E. quarter, and did not intend to convey said southwest quarter to said Edward Jenner Smith, and that the same was so done by mistake.

These defendants show that said United States of America had previously sold and conveyed by patent, dated and delivered the 10th day of April, 1837, the said southwest quarter of said section 36 to Robert Wooden; that the said Robert Wooden purchased the said southwest quarter of the same officers, and at the same office, namely, Palmyra, Missouri, of the said United States of whom and where the said Edward Jenner Smith subsequently purchased the said southeast quarter.

That said Edward Jenner Smith and the officers of the said land office well knew at the time of the purchase of said southeast quarter that said Robert Wooden had previously purchased and received a patent for said southwest quarter and was in the possession

15 of same, and that the said officers of said land office did not

intend to sell again, and the said Edward Jenner Smith did not intend to buy the southwest quarter which had, as stated, been purchased and paid for by said Robert Wooden, but that the bargain was for the adjoining southeast quarter as heretofore stated, and the said patent to Edward Jenner Smith should have conveyed same to him, and would have done so except for the mistake as alleged. These defendants state that immediately after the purchase of said lands the said southeast quarter was entered upon the Government books and plats at said land office at Palmyra, Missouri, as belonging to said Edward Jenner Smith, and that same was returned for taxation, and that said Edward Jenner Smith took possession of same, paid taxes thereon as his own, and in good faith believed that he owned same.

That subsequently the said Edward Jenner Smith conveyed with the other lands purchased by him the said southeast quarter by deed of general warranty to his brother, John. D. Smith, which deed was duly acknowledged and recorded in said Clark county, who took possession of and paid taxes on same until his death, believing in good faith that he was the owner of the same.

That the said John D. Smith by his last will and testament bequeathed, among other lands, the said S. E. quarter to his devisees, and by said last will and testament provided that the executors thereof, James Smith and James Haslett, should divide said Missouri land between the devisees mentioned in said will, which said last will and testament was duly probated in the courts of probate jurisdiction in both Clark and Lewis counties, Missouri.

That subsequently, on the 11th day of May, 1839, under said last will and testament, they divided said lands between devisees, Flora C. Byrne, Mary C. Buck, and James Haslett, and the said
16 southeast quarter was duly allotted to the devisee, Mary Conway Buck, which deed of division was duly acknowledged and filed for record 11th day of May, 1839, and duly recorded in the records of deeds of said Clark county, Missouri; that after the death of said John D. Smith and until said deed of division the said devisees under said will were in possession of and paid taxes on said southeast quarter and other lands, believing in good faith that they were owners of said S. E. quarter.

That after said deed of division the said Mary C. Buck and her husband, —— Buck, took possession of and paid taxes on said southeast quarter until they sold the same, believing in good faith they were owners thereof.

That subsequently the said Mary C. Buck and —— Buck, her husband, conveyed by deed of general warranty, among other lands, the said southeast quarter to Theodore Jungher, which deed was duly acknowledged and recorded in the records of lands of Clark county, Missouri; that thereafter the said Theodore Jungher during his lifetime was in possession of and paid taxes on said southeast quarter, believing in good faith that he was the owner thereof.

That subsequently the said Theodore Jungher departed this life, leaving this defendant, Lucretia A. Jungher, his widow, and this defendant, Sallie F. Johnson, his only heir.

That the defendant, H. Will Johnston, is the husband of said defendant, Sallie F. Johnston.

That these defendants were in possession of and paid taxes on said southeast quarter, and in good faith believed themselves the owners thereof until they sold same.

That some time prior to the commencement of this suit these defendants sold and conveyed by deed of general warranty the said southeast quarter (among other lands) to John W. McKee and Samuel McKee, and that the said McKees took possession of
17 and paid taxes on said southeast quarter, and in good faith believed themselves to be the owners of said land.

That the said McKees verbally leased $14\frac{82}{100}$ acres lying in the south part of said southeast quarter and west of Fox slough and enclosed by a fence to the defendant, O. P. Childers, who was in possession of said $14\frac{82}{100}$ acres only at the commencement of this suit, and still in possession of same as tenant under said McKees. That at the commencement of this suit the said McKees were in possession of all the remainder of said southeast quarter, and they, or those who claim under them, are still in possession of same. These defendants show that the plaintiff is an attorney-at-law; that he has resided at Boonville, Missouri; that the records of plats belonging to the land office at Palmyra, Missouri, and which show the purchase of the lands by Edward Jenner Smith and Robert Wooden, as heretofore stated, are now and have been for a number of years at Boonville; that the said plaintiff is very familiar with the records and plats of the said land office at Boonville, and is and has been for a number of years in the continuous practice of ascertaining and discovering errors of description in the purchase and patenting of lands, and taking advantage of same to secure patents to himself; that the plaintiff has also been for a number of years familiar with the records of the Land Office at Washington, District of Columbia, and has had such knowledge for the purpose not of entering wild lands but of taking advantage of errors and defects of lands honestly and in good faith held by others, and thus securing to himself patents to lands of great value.

That heretofore, before the 15th day of December, 1871, the plaintiff, while prowling through the records of the land offices at Washington and Boonville in pursuit of his nefarious and dishonest business, discovered the error in the patent to said Edward Jenner Smith, and with full knowledge of such error and mistake in the
18 patent in conveying the said S. W. quarter which had been previously patented to Robert Wooden instead of the S. E. quarter purchased by said Smith, and with full knowledge of the possession of these defendants, who were then in possession of said southeast quarter, and with the full knowledge of all the deeds and the will of said John D. Smith through which these defendants claimed title, and with full knowledge that these defendants and those under whom they claim had ever since 1838 been in possession of and paid taxes on said southeast quarter, and with full knowledge that the said southeast quarter was not in the market for sale by the United States, and had not been in the market since 1838,

and with full knowledge that for years there had been no land of the United States for sale in said Clark county, and with full knowledge that the plat of original entries at Boonville and a true transcript thereof which had been certified under the law to Clark county and filed in the recorder's office there showed that said S. E. quarter had been originally entered and purchased by said Edward Jenner Smith; and with full knowledge that these defendants and those under whom they claimed had for more than thirty years believed themselves to be honestly and in good faith the owners of said southeast quarter; and that during all said time neither the United States nor any one else had questioned or disputed their title, and with full knowledge that these defendants were equitably entitled to a patent to said land.

These defendants aver that the said plaintiff, with the full knowledge aforesaid for the purpose of cheating and defrauding these defendants and to secure to himself for a mere nominal sum a tract of land worth at that time at least $3,000, secured an assignment to himself of certain agricultural college scrip of the United States of America to the State of Kentucky, issued under act of Congress for the benefit of agriculture and the mechanic arts, and with such scrip, which cost him a mere nominal sum, procured a patent
19 to be issued to himself for the said southeast quarter, under which patent he now claims title to same.

These defendants aver that whatever title the said plaintiff may have acquired by said patent, he acquired in fraud of their rights, and with the intention to cheat and defraud them, and that he must be held to hold the same in trust for their use and benefit, or the use and benefit of those claiming under them.

These defendants, further answering, say that the said plaintiff acquired the said patent to himself by fraud and misrepresentation practiced on the officers and agents of the United States of America.

Wherefore these defendants pray that this cause may be dismissed at the cost of the plaintiff; but that should the court hold that the said plaintiff acquired any legal title by said patent to him, then that the court decree that the plaintiff hold such title in trust for the use and benefit of these defendants and those claiming under them; and they pray that said tract be declared and enforced and that pl'ff be, by decree, divested of title to said land, and that the same be vested in these defendants or their said grantees, and for such other and further relief as to equity and good conscience may appertain.

P. T. LAMAX,
ANDERSON & BOULWARE, AND
JAMES HAGERMAN,
Attorneys for Defendants: L. A. Jungher and H. Will and Sallie F. Johnstone.

And afterwards, to wit, at a circuit court continued and held as aforesaid before the Hon. John T. Redd, judge, as aforesaid. And on the 14th day of March, A. D., 1876, the following, among other proceeding-, were had, to wit:

20 *Filing of Demurrer.*

ALBERT C. WIDDICOMBE, Plaintiff,
vs.
OLIVER CHILDERS *et al.*, Defendants.

At this day come the parties herein by their attorney. Whereupon pl'ff files demurrer to separate answer of Lucretia Jungher, Sallie Johnson and H. Will Johnson in this cause, which said demurrer is in words and figures as follows, to wit:

A. C. WIDDICOMBE, Pl'ff,
vs.
O. P. SHILDERS, LUCRETIA A. JUNGHER, SALLIE F. JOHNSON and H. W. JOHNSON, Def'ts.

In the Circuit Court, Marion County, Missouri. February Term, 1876.

The plaintiff comes and demurs to the separate answer of the defendants, Lucretia Jungher, Sallie Johnson, H. Will Johnson, and says that said answer does not state facts sufficient to constitute a defence to plaintiff's petition; that defendants are not proper and necessary parties.

THOS. L. ANDERSON,
Att'y for Pl'ffs.

And afterwards, to wit, at a circuit court continued as aforesaid, before the Hon. John T. Redd, judge, as aforesaid; and on the fifteenth day of March, 1876, the following, among other proceedings, were had, to wit:

ALBERT C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDERS *et al.*, Def'ts.

At this day come the parties herein by their attorneys, and the demurrer filed herein to separate answer of Johnson *et al.*, now coming on to be heard and being seen and duly considered, is by the court overruled in this cause.

21 And afterwards, to wit, at a circuit court continued and held as aforesaid, before the Hon. John T. Redd, judge as aforesaid, and on the 16th day of March, 1876, the following, among other, proceedings were had, to wit:

Mo. to Strike Out Part of Def'ts' Ans. Sust.

ALBERT C. WIDDICOMB, Pl'ff, *vs.* OLIVER CHILDERS *et al.* Def'ts.

At this day come the parties herein, by their attorneys, whereupon pl'ff files motion to strike out part of def'ts' answer, which said motion now coming on to be heard, and, being seen and duly considered, is by the court sustained as to all that part of the answer included in the motion, except that part alleging the plaintiff procured his title by fraud.

Which said motion is in words and figures as follows, to wit:

In the Circuit Court of Marion County, Missouri, Feb'y Term, 1876.

A. C. WIDDICOMBE, Pl'ff,
vs.
OLIVER P. CHILDRESS, LUCRETIA A. JUNGHER, SALLIE F. JOHNSON, and H. Will Johnson, Def'ts.

The plaintiff comes and moves the court that so much of the separate answer of the defendants Lucretia Jungher, Sallie Johnson, and H. Will Johnson as is hereinafter set forth may be stricken out, to wit:

These defendants show that the plaintiff is an attorney-at-law; that he has resided at Boonville, Missouri; that the records and plats belonging to the land office at Palmyra, Missouri, and which show the purchase of the land by Edward Jenner Smith and Robert Wooden, as heretofore stated, are now and have been for a number of years at Boonville; that the said plaintiff is very familiar with the records and plats of the said land office at Boonville, and is and has been for a number of years in the continuous practice of ascertaining and discovering errors of description in the purchase and patenting of lands and taking advantage of same to secure
22 patents to himself; that the plaintiff has also been for a number of years familiar with the records of the Land Office at Washington, District of Columbia, and has had such knowledge for the purpose, not of entering wild lands, but of taking advantage of errors and defects of lands honestly and in good faith held by others and thus securing to himself patents to lands of great value; that heretofore before the 15th day of December, 1871, the plaintiff, while prowling through the records of the land offices at Washington and Boonville in pursuit of his nefarious and dishonest business, discovered the error in the patent to said Edward Jenner Smith.

These defendants aver that the said plaintiff, with the full knowledge aforesaid, for the purpose of cheating and defrauding these defendants and to secure to himself for a mere nominal sum a tract of land worth at that time at least $3,000, secured an assignment to himself of certain agricultural college script of the United States of America to the State of Kentucky issued under the act of Congress for the benefit of agriculture and the mechanic arts, and with such script, which cost him a mere nominal sum, procured a patent to be issued to himself for the said southeast quarter, under which patent he now claims title to same.

These defendants, further answering, say that the said plaintiff acquired the said patent to himself by fraud, covin, and misrepresentation practiced on the officers and agents of the United States of America.

THOMAS L. ANDERSON,
Att'y for Pl'ff.

And afterwards, to wit, at a circuit court continued and held as aforesaid, before Hon. John T. Redd, judge as aforesaid, and on Thursday, March 16th, A. D. 1876, the following, among other proceedings were had, to wit:

Mo. Overruled.

ALBERT C. WIDDICOMB, Pl'ff, *vs.* OLIVER CHILDRESS *et al.*, Def'ts.

23 At this day come the parties herein by their attorneys, and, the motion filed herein to set aside order making certain parties co-defendants herein now coming on to be heard and being seen and duly considered, is by the court overruled.

And afterwards, to wit, at a circuit court continued and held as aforesaid before the Hon. John T. Redd as aforesaid, and on Thursday, March the 16th, A. D. 1876, the following, among other proceedings, were had, to wit:

Filing of Replication.

A. C. WIDDICOMB, Pl'ff,
vs.
OLIVER P. CHILDRESS *et al.*, Def'ts.

At this day come the plaintiff herein, by his attorney, and file replication in this cause, which said replication is in words and figures as follows, to wit:

In the Circuit Court Marion Co., Mo. February Term, 1876.

A. C. WIDDICOMBE, Pl'ff,
vs.
O. P. CHILDRESS, LUCRETIA A. JUNGHER, SALLIE F. JOHNSON, and H. WILL JOHNSON, her Husband, Def'ts.

The plaintiff, for replication to defendants' answer, deny that Theodore Jungher died seized of the possession and title to the land described in plaintiff's petition.

Plaintiff denies that previous to the institution of this suit the defendants conveyed the land aforesaid by deed with covenants of warranty to John W. McKee and Sam'l McKee or that they took possession. Plaintiff denies that said John McKee and Sam'l McKee rents a small portion of said land, about $14\frac{82}{100}$ acres, to the def't, O. P. Childress. Pl'ff admits that O. P. Childress is in the possession, but avers that he is in possession of the whole and not a part of said land. Plaintiff denies that Childress is the tenant of John
24 W. McKee & Samuel McKee or those claiming under *him.*

Pl'ff denies that all of the quarter section, except $14\frac{82}{100}$ acres, enclosed, was at the commencement of this suit and has been ever since or is now in the possession of the said McKees or those claiming under them.

Pl'ff denies that neither he nor his ancestors nor his predecessors nor his grantor nor other person under whom he claims was seized or possessed of the premises in question within ten years before the commencement of this action.

Pl'ff denies that for more than thirty years next immediately preceding the commencement of this action the said defendant, O.

P. Childress, the said McKees, and those under whom they claim, were in possession of the said premises. Pl'ff also denies that during said alleged possession such possession was during all said time open, notorious, continuous, and uninterrupted, and adverse to the pl'ff and those under whom he claims. Pl'ff denies that prior to the 30th day of August, 1838, Edward Jenner Smith purchased or intended to purchase the said S. E. quarter of section 36, township 64, range 6 W., in the district of lands subject to sale at Palmyra, Missouri, from the United States of America, and paid the purchase price therefor.

Pl'ff denies that said Smith purchased 400 acres of other lands from the United States in said township and range.

Pl'ff denies that afterwards, on the 30th day of August, 1838, the United States of America attempted to convey by patent the said land to said Edward Jenner Smith. Pl'ff denies that by mistake in said patent the said southeast quarter is not properly described, and that instead of the southwest quarter of said section 36, township 64, range 6 west, it was intended to describe the said S. E. qr. Pl'ff denies that the United States of America intended to convey said S. E. quarter and did not intend to convey said S. W. quarter to said Edward Jenner Smith or that it was done by mistake.

25 Pl'ff says that he has no knowledge or information sufficient to form a belief as to whether or not on the 10th day of April, 1837, the said S. W. quarter, as to said section 36, was sold and conveyed by patent to Robert Wooden, and therefore denies the same.

Pl'ff says that he has no knowledge or information sufficient to form a belief as to whether or not the said Edward Jenner Smith and the officers of the land office at Palmyra knew at the time of the purchase of said southeast quarter that said Robert Wooden had previously purchased and received a patent for said southwest quarter and was in the possession, and that said officers of said land office did not intend to sell again and the said Ed. J. Smith did not intend to buy the said southwest quarter, which had, as stated, been purchased and paid for by said Robert Wooden, but that the bargain was for the adjoining southeast quarter.

Plaintiff denies that said patent to said Ed. J. Smith should have conveyed the same to him and would have done so for the mistake alleged.

Pl'ff says that he has no knowledge or information sufficient to form a belief as to whether or not immediately after the purchase of said land the said southeast quarter was intended upon the Government books and plats at said land office at Palmyra *at Palmyra*, Missouri, as belonging to said Ed. J. Smith, and that same was returned for taxation, and that said Ed. J. Smith took possession of same and paid taxes thereon as his own and in good faith believed that he owned the same, wherefore pl'ff denies the same.

Plaintiff states that he has no knowledge or information sufficient to form a belief as to whether or not subsequently the said Edward J. Smith conveyed, with the other land purchased by him,

26 the said southeast quarter by deed of general warranty to his

brother, John D. Smith, who took possession of *of* and paid taxes on same until his death, believing in good faith that he was the same, wherefore pl'ff denies the same.

Pl'ff states that he has no knowledge or information sufficient to form a belief as to whether or not John D. Smith by his last will and testament bequeathed, among other lands, the said southeast quarter to his devisees, and by said last will and testament that the executors thereof should divide said Missouri lands between the devisees mentioned in said will, and therefore pl'ff denies the same.

Pl'ff says that he has no knowledge or information sufficient to form a belief as to whether or not on the 11th day of May, 1839, under said last will and testament they divided said land between devisees, Flora C. Byrne, Mary C. Buck, and James Haslett, and the said southeast quarter was duly allotted to the devisee Mary Conway Buck, wherefore he denies the same.

Pl'ff denies that after the death of said John D. Smith and until said deed of division the said devisees under said will were in possession of and paid taxes on said southeast quarter and other lands, believing in good faith that they were owners of said S. E. quarter.

Pl'ff denies that after said pretended deeds of division the said Mary C. Buck and her husband took possession and paid taxes on said southeast quarter until they sold the same, believing in good faith they were the owners thereof.

Plaintiff says that he has no knowledge or information sufficient to form a belief as to whether or not the said Mary C. Buck and her husband by deed of general warranty, among other lands, conveyed the southeast quarter to Theodore Jungher or not, wherefore he denies the same.

27 Pl'ff denies that the said Theodore Jungher during his life time was in possession of and paid taxes on said southeast quarter believing — good faith that he was the owner thereof.

Plaintiff says that he has no knowledge or information sufficient to form a belief as to whether or not Theodore Jungher departed this life leaving Lucretia A. Jungher, his widow, and defendant Sallie F. Johnson his only heir.

Pl'ff denies that defendants were in possession of and paid taxes on said southeast quarter and in good faith believed themselves the owners thereof until they sold the same.

Pl'ff denies that sometime prior to the commencement of this suit defendants sold and conveyed by deed of general warranty the said southeast quarter to John W. McKee and Samuel McKee, and that the said McKees took possession of and paid taxes on said southeast quarter in good faith and believed themselves to be the owners of said land.

Pl'ff denies that the said McKees leased $14\frac{82}{100}$ acres lying in the south part of said southeast quarter and west of Fox slough, enclosed by a fence, to defendant O. P. Childers, who was in possession of only $14\frac{82}{100}$ acres.

Pl'ff states the fact to be that said McKees leased the whole of said southeast quarter to said O. P. Childress, who, at the commencement

of this suit, was in the possession of the whole of said southeast quarter.

Pl'ff denies that said McKees were in possession of any part of said southeast quarter at the commencement of this suit.

Pl'ff denies that he ever discovered or knew of any error in the patent to said Edward J. Smith, or that he with any knowledge of any error and mistake in the patent in conveying the said S. W. quarter, which had been previously patented, to Robert Wooden instead of the S. E. quarter purchased by said Smith.

28 Pl'ff denies that he had any knowledge of the possession of defendants at the time he purchased said land of the United States of America or that they were in possession of said southeast quarter.

Pl'ff denies that he had any knowledge of any or all of the deeds named in his answer or of the will of John D. Smith.

Pl'ff denies that he had any knowledge or information as to the pretended title of defendants or those under whom they claim either at or before the time of his purchase.

Pl'ff denies that he had any knowledge or information at the time he bought said lands of the Government or at any time previous thereto that defendants or those under whom they claim had ever been in possession or paid taxes on said land.

Pl'ff denies that at the time of his purchase from the United States he knew that said land had not been in market since 1838.

Pl'ff denies that he purchased said land with any knowledge that for years there had been no land in Clark county for sale; but, on the contrary, pl'ff states that there was and had been land for entry in Clark county before and at the time pl'ff entered said land.

Pl'ff denies that he had any knowledge that the plat of original entries at Boonville or transcript thereof filed in Clark county showed that said land was not subject to entry.

Pl'ff denies that he knew or was informed by records or otherwise that said southeast quarter had been originally entered and purchased by said Ed. J. Smith.

Pl'ff denies that he had any knowledge that the defendant and those under whom they claim had for more than 30 years believed themselves to be honestly and in good faith the owners of said land.

Pl'ff denies that he knew at the time he purchased said land that the defendants were either legally or equitably entitled to said land or a portion thereof.

Pl'ff denies that he acquired his patent to said land in fraud
29 of def'ts' rights and with the intentions to cheat and defraud them, or that he holds the same in trust for them or for their use and benefit.

Pl'ff denies that he obtained a patent to himself by fraud, covin, and misrepresentation practiced on the officers and agents of the United States of America.

Pl'ff denies all the allegations in defendant's answer not admitted in this replication.

A. C. WIDDICOMBE,
By his Attorney, THOS. L. ANDERSON.

And afterwards, to wit, at a circuit court continued and held as aforesaid, before Hon. John T. Redd, judge as aforesaid, and on Monday, July 24th, A. D. 1876, the following, among other proceedings, were had, to wit:

Filing Mo.

A. C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDRESS, Def't.

At this day comes the defendant herein by his attorney and files motion to require the plaintiff to file bond for cost in this cause.

Which said motion is in words and figures as follows, to wit:

Motion.

"In the Circuit Court of Marion County, Missouri.

"A. C. WIDDICOMBE, Plaintiff,

"*against*

"O. P. CHILDERS *et al.*, Defendants.

"The defendants move the court to require the plaintiff to give security for costs—

"Because the plaintiff is insolvent. Because the plaintiff has no property subject to execution in this State.

"ANDERSON AND BOULWARE,
"JAMES HAGERMAN,
"*Attorneys for Defendants.*"

30 And afterwards, to wit, at a circuit court continued and held as aforesaid, before Hon. John T. Redd, judge as aforesaid, and on July 29th, 1876, the following, among other proceedings, were had, to wit:

A. C. WIDDICOMBE, Plaintiff, *vs.* OLIVER CHILDERS, Defendant.

At this day come the parties herein by their attorneys, whereupon defendant files affidavit for continuance, and, on defendant's motion, it is ordered by the court that this cause be continued at defendant's cost. It is therefore considered by the court that the plaintiff have and recover of defendants his costs by him at this term of court expended and that execution issue therefor.

Which said affidavit is in words and figures as follows, to wit:

Filing of Aff. for Cont.

In the Circuit Court of Marion County, Missouri. July Term, 1876.

ALBERT C. WIDDICOMBE *vs.* OLIVER CHILDRESS *et al.*

And now come the above-named defendants and move the court to continue this cause to the next regular term of this court for the reasons stated in the following affidavit: Rufus E. Anderson, attorney for the above-named defendants, being duly sworn, says that the

defendants in this cause are not prepared for and cannot safely go to trial at this term of the court on account of the absence of a material witness; that the name of said witness is John P. Hampton and that he is a resident of Lewis county, Missouri; that the testimony of said absent witness is material in this cause and these defendants cannot safely proceed to the trial of this cause without the testimony of said witness; that no other witness or person is in attendance or known to this affiant by whom he can prove the facts which he expects to prove by said absent witness; that said witness is not absent by the consent, connivance, or procurement of these defendants; that def'ts have used due diligence to procure the attendance of said witness at this term of
31 this court; that on the twenty-fourth day of July, 1876, they caused a subpœna to be issued out and under the seal of this court to be served on said Hampton, which subpœna they caused to be delivered to the sheriff of Lewis county, Missouri, on the 25th day of July, 1876, for services upon said witness, which subpœna was duly served upon said witness in Lewis county, Missouri, on the 26th day of July, 1876, and the same is duly returned executed.

That this affiant has good reason to believe and does believe that defendants will be able to procure the attendance and testimony of said witness at the next regular term of this court; that this application for a continuance of this cause is not made for the purpose of vexation or delay, but that substantial justice may be done and def'ts have a good and meritorious defense in this cause.

RUFUS E. ANDERSON.

STATE OF MISSOURI, *County of Marion,* } *ss:*

Subscribed and sworn to before me this 29th day of July, 1876.

JOSEPH H. DONLEY, *Clerk.*

And afterwards, to wit, at a circuit court continued and held as aforesaid, before the Hon. John T. Redd, judge as aforesaid, and on the 6th day of March, 1877, the following, among other proceedings, were had, to wit:

Filing of Defts' Amended Answer.

A. C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDRESS, Def't.

At this day come the parties herein, by their attorneys. Whereupon, by leave of court first had, defendant files amended answer in this cause.

32 Which said amended answer is in words and figures as follows, to wit:

"*Separate Amended Answer of Lucretia A. Jungherr, Sallie F. Johnstone, and H. Will Johnstone, Her Husband.*"

In the Circuit Court of Marion County, Mo. February Term, A. D. 1877.

A. C. WIDDICOMBE, Plaintiff,
against
O. P. CHILDERS, LUCRETIA A. JUNGHER, SALLIE F. JOHNSTONE, and H. WILL JOHNSTONE, her husband, Defendants.

The defendants, Lucretia A. Jungherr, Sallie F. Johnstone, and H. Will Johnstone, who, upon their own motion, have been made defendants in this cause by order of this court for their separate amended answer, leave of court to file same having been first obtained, to the petition of the plaintiff, state:

These defendants deny each and every allegation in said petition contained, except such as is herein expressly admitted.

These defendants say that at and prior to and ever since the institution of this suit, their codefendant, O. P. Childers, was and has been and now is in possession of $14\frac{82}{100}$ acres only of said southeast quarter, section 36, township 64, range 6 west, in Clark county, Missouri, being that part in the south end of said section, west of Fox slough, and enclosed by a fence.

These defendants state that the defendant, Lucretia A. Jungherr, is the widow, and the defendant, Sallie F. Johnstone, is the heir and only heir-at-law of Theodore Jungherr, deceased, and the defendant, H. Will Johnstone, is the husband of said defendant, Sallie F. Johnstone.

That heretofore, prior to the institution of this suit, the said Theodore Jungherr died, seized of the possession and title to the land described in the petition.

That prior to the institution of this suit these defendants conveyed about 125 acres of the land aforesaid lying west of Fox slough by deed, with covenants of general warranty, to John W. McKee
33 and Samuel McKee, who thereupon entered upon and took possession of said portion of said land and leased the portion above described to defendant, O. P. Childers.

That said McKees, or those claiming under them, have been, ever since before the commencement of this suit, in possesston of the remainder of said portion of said land.

That the possession of said defendant Childers of the portion of said land hereinbefore described has been and is held as tenant of the said McKees or those claiming under them.

These defendants say that the said McKees, or those claiming under them, have notified these defendants to defend this suit as warrantors to them, and that these defendants would be liable to said McKees, or those claiming under them, for breach of their covenants of warranty in their said deed, should the plaintiff prevail in this suit, hence their interest in the proper defense of this suit.

These defendants further answering state that neither the plaintiff,

nor his ancestor, nor his predecessor, nor his grantor, nor any other person under whom he claims, was seized or possessed of the premises in question within ten years before the commencement of this action, and therefore cannot recover.

These defendants further answering say that for more than thirty years next immediately preceding the commencement of this action, the defendant, O. P. Childers, and the said McKees, and these defendants, and those under whom they claim, and those claiming under them, were in possession of the land, and that during all that time, such possession was open, notorious, continuous, under color of title, uninterrupted and adverse to the plaintiff, and those under whom he claims, and therefore the plaintiff cannot recover in this action.

These defendants for equitable answer to the alleged cause of action of the plaintiff show that on or about November 8th, 1834, one Robert Wooden applied for, entered, and paid for the following lands at the land office of the United States of America, then located at the city of Palmyra, in the county of Marion, in the State of Missouri, namely, the west half, and the west half of the northeast quarter, of section (36), in township sixty-four (64), in range six (6) west, then subject to private entry at said office, under and pursuant to acts of Congress of the United States, and subsequently a patent was duly issued to him therefor.

34 That afterwards, on or about July 6th, 1836, one Edward Jenner Smith being desirous to purchase, among other lands in said township, the remaining tracts in said section thirty-six, namely, the east half of the northeast and the southeast quarter thereof, which were then subject to private entry, intended to apply, and did in fact apply, to the register of the said office to purchase them for cash.

That at that time the plat and tract book and other records of said office showed that the last above-described tracts were for sale and that the other tracts in said section had been previously entered by said Robert Wooden as above alleged.

That the said plat and tract book showing the entries of said Wooden in said section thirty-six, and that the last above-described tracts therein were undisposed of and for sale, were shown to said Edward J. Smith by the register of lands then in charge of said office.

That the register of lands then in charge of the said land office, as was then his custom, produced a blank application for purchase at private sale and himself wrote out the application, as he supposed, for the lands last above described, then for sale in said office, and the said Edward J. Smith signed the same, supposing that the application as written was according to the understanding between him and the said Edward J. Smith.

That in writing out said application the said register negligently made a mistake in this—instead of describing therein the southeast quarter of said section 36, he wrote the words "southwest ¼ section 36," which quarter section had been previously entered and disposed of to said Robert Wooden, as was fully shown by all the records of said office and as was fully known to both said Smith and said register.

That the said register of lands, upon his books of original entry, namely, the plat and tract book, made at that time the proper and correct entries, showing that the said Edward J. Smith had entered the said southeast quarter, as intended and understood by him and said Smith, and not the southwest quarter, as erroneously written in the said written application.

That the said Edward J. Smith paid the purchase price of said lands and believed and supposed that he had purchased said southeast quarter, and did not discover the mistake made by the register in writing out said application.

That the said register furnished him with a map showing, as was their mutual understanding, that he had purchased said southeast quarter.

35 These defendants, therefore, aver that the said Edward J. Smith intended to apply for, enter, and pay for, and the said register of lands intended to receive the application for and sell said Smith the said southeast quarter, and that the application as written, for southwest quarter section 36, was mistakingly written through the negligence of the said register.

And these defendants further show that the officers, namely, the register and receiver of the said land office, were the same men at the time of the entries of said Robert Wooden and of said Edward J. Smith, and that the said officers did not intend to receive a second application for or sell a second time the said southwest quarter, and for them to have done so would have been contrary to law and in violation of their instructions and a fraud upon the purchaser at the second sale.

These defendants state that immediately after the purchase of said lands and the entry of same upon the plat and tract book of said land office, as belonging to said Edward J. Smith, he entered upon the possession of same and believed that he owned the same.

That subsequently, on the 6th day of November, 1837, the said Edward J. Smith conveyed, with the other lands so purchased by him, the said southeast quarter by deed of general warranty to his brother, John D. Smith, which deed was duly acknowledged and recorded in said Clark county, Missouri, on page 129, in book A of the records of deeds of said county, who thereupon took possession of and paid taxes on same until his death, claiming and believing in good faith that he was the owner of same.

That the said John D. Smith departed this life on the — day of ——, 1838, and by his last will and testament bequeathed, among other lands, the said southeast quarter to his devisees, and by his said last will and testament provided that the executors thereof, James Smith and James Haslitt, should divide said Missouri lands between the devisees mentioned in said will, which said last will and testament was duly probated in the courts of probate jurisdiction in both Clark and Lewis counties, Missouri, and is duly recorded in book A, page 625, of the record of deeds of said county.

That subsequently, on the 11th day — May, 1839, the said
36 executors under said last will and testament divided said lands between the devisees mentioned in the will, namely:

Flora C. Byrne, Mary C. Buck and James Haslitt, and the said southeast quarter was duly allotted to the devisee, Mary Conway Buck, which deed of division was duly acknowledged and filed for record, and duly recorded May 11th, 1839, in the record of deeds of said Clark county, in book A, page 587.

That after the death of said John D. Smith, and until said deed of division, the devisees, under said will, were in possession of, and paid taxes on said southeast quarter and other lands, claiming and believing they were the owners of same in trust for the purposes specified in said last will and testament.

That after the said deed of division the said Mary C. Buck and her husband took possession of and paid taxes on said southeast quarter until they sold the same, claiming, and believing in good faith, they were the owners thereof.

That subsequently, to wit, on or about the 18th day of September, 1857, the said Mary C. Buck and John Buck, her husband, conveyed by deed of general warranty, among other lands, the said southeast quarter to Theodore Jungherr, which deed was duly acknowledged and recorded in the records of lands in Clark county, in book K, page 135, of records of deeds.

That thereafter the said Theodore Jungherr, during his lifetime, was in possession of and paid taxes on said southeast quarter, claiming, and believing in good faith, that he was the owner thereof.

That subsequently the said Theodore Jungherr departed this life, leaving this defendant, Lucretia A. Jungherr, his widow, and this defendant, Sallie F. Johnstone, his only heir; that the defendant H. Will Johnstone is the husband of said defendant, Sallie F. Johnstone.

That after the death of said Theodore Jungherr these defendants were in possession of and paid taxes on said southeast quarter, and in good faith claiming and believing themselves the owners thereof.

That prior to the institution of this suit, to wit, about the 18th day of June, 1870, these defendants sold and conveyed by deed of general wa-ranty about 35 acres more of less of said southeast quarter, being the part thereof lying east of Fox slough, to E. Pratt Buell and John Fallon; and the said Buell and Fallon, or those claiming under them, have ever since been in possession of said land and paying taxes, claiming in good faith and believing themselves to be the owners thereof.

37 That prior to the institution of this suit, to wit, on or about January 1st, 1873, these defendants sold and conveyed, by deed of general warranty, the remaining portion of said southeast quarter, being about 125 acres, more or less, lying west of Fox slough, to John W. McKee and Samuel McKee, and that said McKees took possession of said portion of said southeast quarter, and they, or those claiming under them, have ever since been in possession thereof and paying taxes on same, claiming and believing in good faith that they were the owners thereof.

That the said McKees, in the year 1874, verbally leased $14\frac{82}{100}$ acres, lying in the south part of said southeast quarter, and west of Fox slough, and enclosed by a fence, to the defendant, O. P. Childers,

who was in the possession of said $14\frac{82}{100}$ acres only at the commencement of this suit, as tenant of said McKees, and still is in possession of same as tenant of said McKees, or those claiming under them; that all the remainder of said southeast quarter was, at the commencement of this suit and is now, in the possession of said McKees and said Buell and Fallon, or those claiming under them.

These defendants show that the plaintiff is an attorney-at-law; that he has resided at Boonville, Missouri; that the original records and plats formerly belonging to the land office at Palmyra, Missouri, and which show or did show the proceedings before said land office, relative to the said purchases of said Robert Wooden and said Edward J. Smith, are now, and have been for a number of years last past, kept at Boonville.

That the said plaintiff is very familiar with, and an expert in his knowledge of, the records and plats of the said land office at Boonville, and is and has been for a number of years in the continuous practice of ascertaining and discovering errors of description in the purchase of lands and taking advantage of same to secure patents to himself; that the plaintiff has also been for a number of years practicing before the General Land Office at Washington, District of Columbia, until, by reason of his dishonest practice, the Commissioner of the General Land Office excluded him from practicing before said Department, and familiar with the records of said Land Office and has been constantly using such knowledge for the purpose, not of entering vacant lands, but of taking advantage of errors and defects in titles of lands honestly and in good faith held by others and thus securing to himself patents to lands of great value.

38 That heretofore, on or about May 10, 1871, the plaintiff, "while prowling through the records of the Land Offices at Washington and Booneville in pursuit of his nefarious and dishonest business," discovered the mistake and error in the written application of said Edward J. Smith and in the patent which had issued thereon, and with full knowledge of the mistake which had been made in said application and patent, being for the southwest quarter instead of the southeast quarter of said section 36; and with full knowledge that the said Wooden had previously purchased and paid for and received a patent for said southwest quarter; and with full knowledge of the possessions of these defendants and those claiming under them who were then in possession of said southeast quarter; and with full knowledge of all the deeds and the will of John D. Smith, hereinbefore set out, under which these defendants claimed title; and with full knowledge that these defendants and those claiming under them and those under whom they claimed had, ever since 1836, been in possession of and paying taxes on said southeast quarter, claiming in good faith and believing themselves to be the owners thereof; and with full knowledge that the southeast quarter was not in the market for sale by the United States and had not been since 1836; and with full knowledge that for years there had not been any public land for sale in said Clark county, and that the last tract in said township 64, range 6, had been sold as far back as 1848; and with full knowledge that the original plat

and tract-book, the books of original entries at Boonville, and a true transcript thereof, which had been certified under the law to Clark county and filed in the recorder's office there, showed that the said southeast quarter had been originally entered and purchased by said Edward J. Smith; and with full knowledge that the defendants and those claiming under them and those under whom they claimed had, for more than thirty years, believed themselves to be honestly and in good faith the owners of said southeast quarter, and that during all said time neither the United States nor any one else had questioned or disputed their title; and with full knowledge that these defendants or those claiming under them were equitably entitled to a patent to said land. With the full knowledge of all the facts and circumstances aforesaid, the said plaintiff, for the purpose of cheating and defrauding these defendants and those claiming under them and to secure to himself, for a mere nominal
39 sum, a tract of land worth at that time at least $3,000, secured an assignment to himself of certain agricultural college scrip of the United States of America to the State of Kentucky, issued under act of Congress for the benefit of agricultural and mechanical arts, and with such scrip, which cost him a mere nominal sum, procured a patent to be issued to himself for the said southeast quarter, under which patent he now claims title.

These defendants charge that the plaintiff, in order to secure the patent to said land, fraudulently erased and changed, or fraudulently caused to be erased and changed, the original plat and tract book on file at Boonville, so that they might conform to the said erroneously written application of Edward J. Smith, and show that said Smith, instead of entering said southeast quarter, entered the said southwest quarter, which had been previously entered and paid for and patented to said Robert Wooden.

These defendants aver that the erasure and change of said plat and tract book was also fraudulent and wrongful in that, under the rules and regulations of the General Land Office the said southeast quarter had been, on account of the mistakes on the said plat and tract book, withheld from the market for years, and it could not be restored to market or offered for sale again without publication of its restoration to market having first been made.

That the object and purpose of these rules and regulations were to give public notice that those parties who might have equities in the land might protect themselves.

That these rules and regulations and their effect and purpose were well known to plaintiff, and the plaintiff also well knew that on account of the markings of said plat and tract book the said land had been withheld from market, and the plaintiff fraudulently procured a patent to said southeast quarter without having same restored to market; and, therefore, these defendants further say that said plaintiff fraudulently imposed upon the officers of the land office, or fraudulently conspired with some of them to secure said patent to said land without complying with the rules and regulations of the land department—that he might the more certainly cheat and defraud these defendants or those claiming under them.

These defendants charge that whatever legal title the plaintiff may have acquired by said patent he acquired with knowledge of and in fraud of these rights, and with the intention to cheat and defraud them, and that he must be held to hold the same in trust for their use and benefit, or the use and benefit of those claiming under them.

Wherefore these defendants pray that if the court should find that the plaintiff has the legal title to said land that the court
40 decree the same to these defendants, or to those claiming under them, and for such other and further relief as to equity and good conscience may being.

JAMES HAGERMAN,
P. T. LOMAX, and
ANDERSON AND BOULWARE,
Attorneys for Defendants.

And afterwards, to wit, at a circuit court continued and held as aforesaid, before Hon. John T. Redd, judge as aforesaid, and on the 7th of March, 1877, the following, among other, proceedings, were had, to wit:

Filing of Mo.

A. C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDERS, Def't.

At this day come the defendant here, by his attorney, and filed a motion to strike out part of defendant's answer in this cause; which said motion is in words and figures as follows, to wit:

Motion.

In the Circuit — of Marion County, Missouri. February Term, 1877.

A. C. WIDDICOMBE, Pl'ff,
against
O. P. CHILDRESS, LUCRETIA A. JUNGHER, SALLIE F. JOHNSTON, and H. WILL JOHNSTON, her Husband, Def'ts.

The plaintiff comes and moves the court that so much of the amended answer of the defendants, Lucretia A. Jungher, Sallie F. Johnston, and H. Will Johnston, her husband, as is hereinafter set forth, may be stricken out, to wit:

The defendants show that the plaintiff is an attorney-at-law.

That he has resided at Boonville, Missouri; that the original records and plats formerly belonging to the land office at Palmyra, Missouri, and which show or did show the proceedings before said land office relative to the said purchase of said Robert Wooden and said Edward Jenner Smith, are now and have been for a number of years last past kept at Boonville.

41 That the said plaintiff is very familiar with and an expert in his knowledge of the records and plats of the said land office at Boonville, and is and has — for a number of years in the continu*ance* practice of ascertaining and discovering errors of description in the purchase of lands and taking advantage of same to

secure patents to himself; that the plaintiff has also been for a number of years practicing before the General Land Office at Washington, District of Columbia, until by reason of his dishonest practices the Commissioner of the General Land Office excluded him from practicing before the said Department, and familiar with the records of said office, and has been constantly using such knowledge for the purpose, not of entering vacant lands, but of taking advantage of errors and defects in titles of lands honestly and in good faith held by others, and thus securing to himself patents to lands of great value.

That heretofore, on or about May 10th, 1871, the plaintiff, while prowling through the records of the land offices at Washington and Boonville in pursuit of his nefarious and dishonest business, discovered the mistake and error in the written application of Edward Jenner Smith and in the patent which had issued thereon, and with full knowledge of the mistake which had been made in said application and patent being for the S. W. quarter instead of the southeast quarter of said section 36, and with full knowledge that the said Wooden had previously purchased and paid for and received a patent for said S. W. quarter, and with full knowledge of the possessions of these defendants and those claiming under them, who were then in possession of the southeast quarter, and with full knowledge of all the deeds and the will of John D. Smith hereinbefore set out, under which these defendants claimed title, and with full knowledge that these defendants *and those defendants* and those under whom they claimed had, ever since 1836, been in possession of and
42 paying taxes on said southeast quarter, claiming in good faith and believing themselves to be the owners thereof, and with full knowledge that the southeast quarter was not in the market for sale by the United States and had not been since 1836, and with full knowledge that for years there had not been any public land for sale in said Clarke county, and that the last tract in said township 64, range 9, had been sold as far back as 1848, and with full knowledge that the original plat and tract book—the books of the original entries at Boonville and a true transcript thereof which had been certified under the law to Clarke county and filed in the recorder's office there—showed that the said southeast quarter had been originally entered and purchased by said Edward Jenner Smith, and with full knowledge that the defendants and those claiming under them, and those under whom they claimed, had, for more than thirty years, believed themselves to be honestly and in good faith the owners of said southeast quarter, and that during all said time neither the United States nor any one else had questioned or disputed their title, and with full knowledge that these defendants or those claiming under them were equitably entitled to a patent to said land. With the full knowledge of all these facts and circumstances aforesaid, the said plaintiff, for the purpose of cheating and defrauding these defendants and those claiming under them, and to secure to himself for a mere nominal sum a tract of land worth at that time at least $3,000, secured an assignment to himself of certain agricultural college scrip of the United States of America to the

State of Kentucky, issued under the act of Congress for the benefit of agricultural and mechanical arts, and with such scrip, which cost him a mere nominal sum, procured a patent to be issued to himself for the said southeast quarter, under which patent he now claims title.

43 These defendants charge that the plaintiff, in order to secure the patent to said land, fraudulently erased and changed or fraudulently caused to be erased and changed the original plat and tract book on file at Boonville so that they might conform to the said erroneous-written application of Edward Jenner Smith and show that said Smith, instead of entering said southeast quarter, entered the said southwest quarter, which had been previously entered and paid for and patented to said Robert Wooden.

These defendants aver that the erasure and change of said plat and tract book was also fraudulently and wrongful in that, under the rules and regulations of the General Land Office, the said southeast quarter had been, on account of the mistakes on said plat and tract book, withheld from the market for years, and it could not be restored to market or offered for sale again without publication of its restoration to market having first been made.

That the object and purpose of these rules and regulations were to give public notice, that those parties who might have equities in the land might protect themselves.

That these rules and regulations and their effect and purpose were well known to plaintiff, and the plaintiff also well knew that on account of the makings of said plat and tract book the said land had been withheld from market, and the plaintiff fraudulently procured a patent to said southeast quarter without having same restored to market; and therefore the defendants further say that said plaintiff fraudulently *enforced* upon the officers of the land office or fraudulently conspired with some of them to secure said patent to said land without complying with the rules and regulations of the Department, that he might the more certainly cheat and defraud these defendants or those claiming under them.

44 These defendants charge that whatever legal title the plaintiff may have acquired by said patent he acquired with knowledge of and in fraud of their right and with the intention to cheat and defraud them, and that he must be held to hold the same in trust for their use and benefit or those claiming — them.

THOS. L. ANDERSON,
ED. R. McKEE,
Att'ys for Plaintiff.

And afterwards, to wit, at a circuit court continued and held as aforesaid, before the Hon. John T. Redd, judge as aforesaid, and on the 8th day of March, 1877, the following, among other, proceedings were had, to wit:

Filing of Pl'ff's Demurrer.

A. C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDERS, Def't.

At this day comes the plaintiff herein, by his attorney, and files demurrer to second count in defendant's answer in this cause; which said demurrer is in words and figures as follows, to wit:

Demurrer.

In the Circuit Court of Marion County, Missouri. February Term, 1877.

ALBERT C. WIDDICOMBE, Plaintiff,
against
OLIVER P. CHILDERS, LUCRETIA A. JUNGHER, SALLIE F. JOHNSTON, and H. WILL JOHNSTON, Defendants.

The plaintiff comes and demurs to the second count of the amended answer of defendants, Lucretia A. Jungher, Sallie F. Johnston, and H. Will. Johnston, it being the equitable relief set up because said count does not state facts sufficient to constitute a cause of action or defense to this suit.

THOMAS L. ANDERSON,
ED. R. McKEE,
Att'ys for Pl'ff.

And afterwards, to wit, at a circuit court continued and held as aforesaid, before the Hon. John T. Redd, judge as aforesaid,
45 and on Thursday, March the 8th, A. D. 1877, the following, among other, proceedings were had, to wit:

Demurrer Overruled to Def't's Answer.

A. C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDRESS, Def't.

At this day come the parties herein, by their attorneys, and the demurrer to defendant's answer herein now coming on to be heard, being seen and duly considered, is by the court overruled in this cause.

And afterwards, to wit, at a circuit court continued and held as aforesaid, before the Hon. John T. Redd, judge as aforesaid, and on Saturday, March the 10, A. D. 1877, the following, among other, proceedings were had, to wit:

A. C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDRESS *et al.*, Def'ts.

At this day come the parties herein, by their attorneys, and the plaintiff's motion to strike out defendants' amended answer herein now coming on to be heard, being seen and duly considered, is by the court sustained; whereupon it is ordered by the court that certain portions of defendants' amended answer be stricken out; which

portion of said amended answer stricken out reads as follows, to wit: The defendants show that the plaintiff is an attorney-at-law; that he has resided at Boonville, Missouri; that the original records and plats, formerly belonging to the *law* office at Palmyra, Missouri, and which show or did show the proceedings before said land office relative to the said purchasers of said Robert Wooden and said Edward Jenner Smith, are now and have been for a number of years last past kept at Boonville; that the said plaintiff is very familiar with and an expert in his knowledge of the records and plats of the said land office at Boonville, and is and has been for a number of years in the continuous practice of ascertaining
46 and discovering errors of description in the purchase of lands and taking advantage of same to secure patents to himself; that the plaintiff has also been for a number of years practicing before the General Land Office at Washington, District of Columbia, until by reason of his dishonest practices the Commissioner of the General Land Office excluded him from practicing before the said Department, and familiar with the records of said land office, and has been constantly using such knowledge for the purpose, not of entering vacant lands, but of taking advantage of errors and defects in titles of lands honestly and in good faith held by others, and thus securing to himself patents to lands of great value; while prowling through the records of the land offices at Washington and Boonville in pursuit of his nefarious and dishonest business, and with full knowledge that for years there had not been any public land for sale in said Clarke county, and that the last tract in said township 64, range 9, had been sold as far back as 1848, and with full knowledge that these defendants and those claiming under them, and those under whom they claimed, had for more than thirty years believed themselves to be honestly and in good faith the owners of said southeast quarter, and that during all said time neither the United States nor any — else had questioned or disputed their title; these defendants aver that the erasure and change of said plat and tract book was also fraudulent and wrongful in that, under the rules and regulations of the General Land Office, the said southeast quarter had been, on account of the mistakes on said plat and tract book, withheld from the market for years, and it could not be restored to market or offered for sale again without publication of its restoration to market having first been made; that the object and purpose of these rules and regulations were to give public notice that those parties who might have equities in the land
47 might protect themselves; that these rules and regulations and their effect and purposes were well known to plaintiff, and the plaintiff also well knew that on account of the markings of said plat and tract book the said land had been withheld from market, and the plaintiff fraudulently procured a patent to said southeast quarter without having same restored to market; and thereupon the defendants further say that said plaintiff fraudulently imposed upon the officers of the land office or fraudulently conspired with some of them to secure said patents to said land without complying with the rules and regulations of the Depart-

ment, that he might the more certainly cheat and defraud these defendants or those claiming under them.

And afterwards, to wit, at a circuit court continued and held as aforesaid, before the Honorable John T. Redd, judge as aforesaid, and on Monday, March the 12th, A. D. 1877, the following, among other, proceedings were had, to wit:

Leave to File Reply.

A. C. WIDDICOMBE, Pl'ff, *vs.* OLIVER CHILDRESS, Def't.

At this day come the parties herein, by their attorneys, whereupon it is ordered by the court that plaintiff have leave to file replication to defendant's answer sixty days before next term in this cause, and this cause is continued.

And afterwards, to wit, at a circuit court continued and held as aforesaid, before Hon. John T. Redd, judge as aforesaid, and on Thursday, November the 8th and 16th day of adjourned July term, A. D. 1877, the following, among other proceedings, were had, to wit:

Filing of Replication.

ALBERT C. WIDDICOMBE, Pl'ff,
vs.
O. P. CHILDERS *et al.*, Def'ts.

At this day comes the plaintiff herein, by his attorney, and files replication to defendants' answer in this cause.

48 Which said replication is in words and figures, as follows, to wit:

Replication.

In the Circuit Court Marion County, Missouri. February Term, 1876.

A. C. WIDDICOMBE, Pl'ff,
vs.
O. P. CHILDERS, LUCRETIA A. JUNGHER, SALLIE F. JOHNSTON, and H. WILL JOHNSTON, Her Husband, Def'ts.

The plaintiff, for a replication to defendants' answer, deny that Theodore Jungher died seized of the possession and title to the land described in plaintiff's petition.

Pl'ff denies that previous to the institution of this suit the defendants conveyed the land aforesaid by deed with covenants of warranty to John W. McKee and Samuel McKee or that they took possession. Plaintiff denies that said John McKee and Sam'l McKee rent a small portion of said land—about 14.82 acres—to the defendant, O. P. Childers. Pl'ff admits that O. P. Childers is in the possession, but avers that he is in possession of the whole and not a part of said land. Plaintiff denies that Childers is a tenant of John W. McKee and Samuel McKee or those claiming under *him.*

Pl'ff denies that all of the quarter-section except 14.82 — enclosed was, at the commencement of this suit, and has been ever since or is now, in the possession of the said McKees or those claiming under them.

Pl'ff denies that neither he nor his ancestors nor his predecessors nor his grantor nor other person under whom he claims was seized or possession of the premises in question within ten years before the commencement of this action.

Pl'ff denies that for more than thirty years next immediately preceding the commencement of this action the said defendant, O. P. Childers, the said McKees, and those under whom they claim were in possession of the said premises. Pl'ff also denies that during said alleged possession such possession was during all said time
49 open, notorious, continuous, and uninterrupted and adverse to the plaintiff and those under whom he claims. Pl'ff denies that prior to the 30th day of August, 1838, Edward Jenner Smith purchased or intended to purchase the said S. E. qr. of section 36, township 64, range 6 W., in the district of lands subject to sale at Palmyra, Missouri, from the United States of America, and paid the purchase price therefor.

Plaintiff denies that said Smith purchased 400 acres of other lands from the United States in said township and range.

Pl'ff denies that afterwards, on the 30th day of August, 1838, the United States of America attempted to convey by patent the said land to said Edward Jenner Smith. Pl'ff denies that by mistake in said patent the said southeast quarter is not properly described, and denies that instead of the southwest quarter of said section 36, township 64, range 6 west, it was intended to describe the said S. E. qr. Pl'ff denies that the United States of America intended to convey said S. E. qr. and did not intend to convey said S. W. quarter to said Edward Jenner Smith or that it was done by mistake.

Pl'ff says that he has no knowledge or information sufficient to form a belief as to whether or not on the 10th day of April, 1837, the said southwest quarter, as to said section 36, was sold and conveyed by patent to Robert Wooden, and therefore denies the same.

Pl'ff says that he has no knowledge or information sufficient to form a belief as to whether or not the said Edward Jenner Smith and the officers of the land office at Palmyra knew at the time of the purchase of said southeast quarter that said Robert Wooden had previously purchased and received the patent for said southwest quarter and was in the possession, and that said officers of said land office did not intend to sell again and the said Ed. J. Smith did not intend to buy the said southwest quarter, which had, as stated, been purchased and paid for by said Robert Wooden, but that the
50 bargain was for the adjoining southeast quarter.

Pl'ff denies that said patent to Edward J. Smith should have conveyed the same to him and would have done so — for the mistake alleged.

Pl'ff says that he has no knowledge or information sufficient to form a belief as to whether or not immediately after the purchase of said land the said southeast quarter was entered upon the Gov-

ernment books and plats at said land office at Palmyra, Missouri, as belonging to said Ed. J. Smith, and that same was returned for taxation, and that said Ed. J. Smith took possession of same and paid taxes thereon as his own and in good faith, believing that he owned the same. Wherefore plaintiff denies the same.

Plaintiff states that he has no knowledge or information sufficient to form a belief as to whether or not subsequently the said Edward J. Smith conveyed with the other land purchased by him the said southeast quarter by deed of general warranty to his brother, John D. Smith, who took possession of and paid taxes on same until his death, believing in good faith that he was the same. Wherefore plaintiff denies the same.

Plaintiff states that he has no knowledge or information sufficient to form a belief as to whether or not John D. Smith by his last will and testament bequeathed, among other lands, the said southeast quarter to his devisees, and by said last will and testament that the executors thereof should divide said Missouri lands between the devisees mentioned in said will, and therefore plaintiff denies the same. Pl'ff says that he has no knowledge or information sufficient to form a belief as to whether or not on the 11th day of May, 1839, under said last will and testament they divided said land between
devisees, Flora C. Byrne, Mary C. Buck, and James Haslett,
51 the said southeast quarter was duly allotted to the devisee,
Mary Conway Buck. Wherefore he denies the same.

Pl'ff denies that after the death of said John D. Smith and until said deed of division the said devisees under said will were in possession of and paid taxes on said southeast quarter and other lands, believing in good faith that they were owners of said S. E. quarter.

Pl'ff denies that after said pretended deed of division the said Mary C. Buck and her husband took possession and paid taxes on said southeast quarter until they sold the same, believing in good faith they were the owners thereof.

Pl'ff says that he has no knowledge or information sufficient to form a belief as to whether or not the said Mary C. Buck and her husband by deed of general warranty, among other lands, conveyed the southeast quarter to Theodore Jungher or not. Wherefore he denies the same.

Pl'ff denies that the said Theodore Jungher during his lifetime was in possession of and paid taxes on said southeast quarter, believing in good faith that he was the owner thereof.

Pl'ff says that he has no knowledge or information sufficient to form a belief as to whether or not Theodore Jungher departed this life leaving Lucretia A. Jungher, his widow, and defendant, Sallie F. Johnson, his only heirs.

Pl'ff denies that defendants were in possession of and paid taxes on said southeast quarter and in good faith believed themselves the owners thereof until they sold the same.

Pl'ff denies that some time prior to the commencement of this suit defendants sold and conveyed by deed of general warranty the said southeast quarter to John W. McKee and Samuel McKee, and that the said McKees took possession of and paid taxes on said southeast

quarter in good faith and believed themselves to be the owners of said land.

52 Pl'ff denies that said McKees leased $14\frac{82}{100}$ acres lying in the south part of said southeast quarter and west of Fox slough, enclosed by a fence, to defendant, O. P. Childers, who was in possession of only $14\frac{82}{100}$ acres.

Plaintiff states the facts to be that said McKees leased the whole of said southeast quarter to said O. P. Childers, who, at the commencement of this suit, was in the possession of the whole of said southeast quarter.

Pl'ff denies that said McKees were in possession of any part of said southeast quarter at the commencement of this suit.

Pl'ff denies that he ever discovered or knew of any error in the patent to said Edward J. Smith, or that he with any knowledge of any error and mistake in the patent in conveying the said S. W. qr. which had been previously patented, to Robert Wooden instead of the S. E. qr. purchased by said Smith.

Pl'ff denies that he had any knowledge of the possession of the defendants at the time he purchased said land of the United States of America or that they were in possession of said southeast quarter.

Pl'ff denies that he had any knowledge of any or all of the deeds named in his answer or of the will of John D. Smith.

Pl'ff denies that he had any knowledge or information as to the pretended titles of defendants or those under whom they claim either at or before the time of his purchase.

Pl'ff denies that he had any knowledge or information at the time he bought said land of the Government or at any time previous thereto that defendants or those under whom they claim had ever been in possession or paid taxes on said land.

Pl'ff denies that at the time of his purchase from the United States he knew that said land had not been in market since 1838.

Pl'ff denies that he purchased said land with any knowledge that for years there had been no land in Clarke county for sale; but, on the contrary, pl'ff states that there was and had been land for entry in Clarke county before and at the time pl'ff entered said lands.

53 Pl'ff denies that he had any knowledge that the plat of original entries at Boonville or transcript thereof filed in Clarke county showed that said land was not subject to entry.

Plaintiff denies that he knew or was informed by record or otherwise that said southeast quarter had been originally entered and purchased by said Ed. J. Smith.

Pl'ff denies that he had any knowledge that the defendants and those under whom they claim had for more than thirty years believed themselves to be honestly and in good faith the owners of said land.

Pl'ff denies that he knew at the time he purchased said land that the defendants were either legally or equitably entitled to said land or a patent therefor.

Pl'ff denies that he acquired his patent to said land in fraud of defendants' rights and with the intentions to cheat and defraud

them, or that he holds the same in trust for them or for their use and benefit.

Pl'ff denies that he obtained a patent to himself by fraud, covin, and misrepresentation practiced on the officers and agents of the United States of America.

Pl'ff denies all the allegations in defendants' answer not admitted in this replication.

A. C. WIDDICOMBE,
By his attorney, THOS. L. ANDERSON.

And afterwards, to wit, at a circuit court continued and held as aforesaid, before Hon. John T. Redd, judge as aforesaid, and on Friday, November the 16th, A. D. 1877, the following, among other, proceedings were had, to wit:

Judgment.

ALBERT C. WIDDICOMBE, Pl'ff,

vs.

OLIVER P. CHILDERS, LUCRETIA JUNGHER, S. F. and H. W. JOHNSTON, Def'ts.

54 The action of plaintiff and cross-action of defendants Jungher and Johnston coming on to be heard before the court upon the pleadings and evidence in the cause, the court doth find the following facts:

That on the 8th day of November, 1834, one Robert Wooden entered at the land office at Palmyra the west one-half (½) of section thirty-six (36), township sixty-four (64), range six (6), and the west one-half (½) of the northeast quarter of said section, and on the 10th of April, 1837, a patent issued to said Wooden for said tracts.

That at the time of Wooden's entry the number of the entry of the west one-half of said section, to wit, No. 7417, was entered on the plat book of said section on each of the quarters composing said one-half section, viz., the northwest quarter and southwest quarter, and the number of this entry of the eighty-acre tract, viz., No. 7418, was entered on said tract on the plat of said section, and at the same time the fact of his entry was stated by the register in the tract book, showing the description and quantity of the tracts, the date of the entry, and the name of the purchaser.

That afterwards, to wit, on the 6th day of July, 1836, one Edward Jenner Smith applied to the register to enter or purchase the remainder of said section thirty-six, to wit, the southeast quarter of said section and the east one-half of the northeast quarter; that at the date of Smith's application Wm. Wright was still register, and the plat book and tract book both showed that the said southeast quarter and east one-half of northeast quarter of said section were vacant, and that the west one-half of said section and west one-half of the northeast quarter had been sold in 1834 to Robert Wooden; that Wm. Wright agreed to sell and did sell to said Edward Jenner Smith said southeast quarter and the east one-half of the northeast

quarter of said section, and that Wm. Wright, the register, at
55 the instance of said Smith, filled up a blank application in furtherance of said sale, but, in so doing, by mistake in describing said southeast quarter, substituted the letter W instead of the letter E, by reason of which said mistake said application described said quarter as the southwest quarter instead of the southeast quarter of said section 36.

That said Wm. Wright, on the return to him by said Smith of said application, with the certificate of the receiver indorsed thereon, showing the payment to said receiver of the purchase price of a quarter-section and eighty acres, and, failing to discover the mistake in the description in said application, did, on the day said sale was made, enter the fact of said sale on his tract book by the correct description, viz., the southeast quarter and the east one-half of the northeast quarter of said section 36, 64, 6 (immediately under the entry of the sale to Wooden), giving in his said entry the date of said sale and the name of the purchaser, viz., said Edward J. Smith, and did also at the same time enter the number of said entries on both said tracts on his plat book, viz., on the southeast quarter No. 14513 and the east one-half of the northeast quarter No. —, and that said entries made by William Wright, the register, at the time of the sale remained on said plat of said section and on said tract book unchanged as late as 1858, a period of twenty-two years.

The court further finds that at some time between 1858 and the spring of 1871 said entries were changed as follows, viz: In the entry on the tract book of the sale of the southeast quarter to Edward J. Smith, dated July 6th, 1836, the letter E in the description of the quarter-section was erased and the letter W substituted, so as to make said description read, after said erasure and substitution, the southwest quarter instead of the southeast quarter, thus making it appear that the southwest quarter had been twice sold—once in 1834 to Robert Wooden and again in 1836 to Edward J. Smith; and at the same time the number of Smith's entry indorsed at the time by the register on the southeast quarter on the plat of said section was erased and the same number indorsed on the southwest quarter, immediately under the number of Wooden's entry on said quarter; that said erasure and alterations were not made by William Wright, because, first, they are not in his handwriting; second, they were made after 1858, and consequently after his death. By whom they were made the evidence does not show. It discloses the fact that plaintiff had an opportunity
56 to have made them, and availed himself of them after they were made. After said erasures and alterations were made, and at the time of plaintiff's entry, May 10th, 1871, the inspection of the plat, the number of Smith's entry on the southeast quarter having been erased and entered on the southwest quarter under the number of Wooden's entry of that quarter, the plat would show the southeast quarter vacant, and on inspection of the tract book it would show Wooden's entry, in 1834, of the southwest quarter and Smith's entry, in 1836, of southwest quarter and the southeast quarter consequently vacant or subject to sale; said

plat and tract book would, however, further show that there had been an erasure on the portion of the paper occupied by the letter W in the description — southwest quarter on the tract book, and that said letter W was in a different handwriting from the remainder of the entry, and apparently a much later date, and the inquiry would naturally suggest itself to plaintiff's mind what letter had been erased, and it would occur to him it could have been no other than the letter E; and, if so, then the original entry of sale must have been the southeast quarter. Looking from this to the plat of the section in the plat book, he would there see that an entry had been made on the plat of the southeast quarter and erased, and that the number corresponding to the tract, originally the southeast quarter on tract book, was entered on the southwest quarter immediately under the No. 7417, corresponding to Wooden's entry. With these facts before his eyes, it would suggest itself to him that one of two states of fact must exist, either, first, that the register had sold the southwest quarter twice—once to Wooden and again to Smith, and had by mistake entered on his tract book and plat the sale to Smith of the southeast quarter instead of the southwest quarter—or he had in fact sold the southeast quarter to Smith and entered the memorandum of sale on his tract book and plat correctly, but made the mistake in the application, and that the original entry had been erased and altered contrary to the facts. These facts, in connection with the other circumstances proved, were sufficient to have put him, as a conscientious and prudent man, on inquiry, and if he had gone to the locality of the land he would have learned that at all times since the entry, in 1836, Smith and those under him had claimed to own the southeast quarter, and had never set up any claim to the south-
57 west quarter, which was claimed alone by Wooden. Under this state of facts the court finds that the equitable — at the time of the entry by plaintiff, viz., May 10, 1871, and at the time the patent issued to plaintiff, December 15, 1871, was in the defendant, Sally F. Johnstone, sole heir-at-law of Theodore Jungherr, deceased, and that defendant, Lucretia Jungherr, widow of said Theodore, by operation of the muniments of title read in evidence by defendants, viz., the deed of E. Jenner Smith to John Smith, the will of John Smith, the deed of Smith & Haslet, executors of John Smith, to Mary C. Buck, and the deed of Mary C. Buck to Theodore Jungherr; and the plaintiff, in making said entry and accepting said patent, with notice of such facts and circumstances as were sufficient to put him upon inquiry as to such equitable title, took said patent, with notice of such equity then in defendants, and held the same in trust for defendants, and the defendant Childers being in possession of fourteen acres of said tract as tenant of McKee & McKee, grantees of defendants, Johnson and Jungherr; that, consequently, such facts are a good equitable defense to plaintiff's action, and the verdict on the plaintiff's action is for the defendant Childers; it further appearing that the defendants, Sally F. Johnstone and Lucretia Jungherr, by their deed dated May 5, 1873, conveyed all their right, title, and interest (to wit, their equitable title) to E. Pratt Buell and John Fallon in and to 125 acres of said southeast quarter lying west of

Fox slough, & on the 18th of June, 1875, conveyed, by deed, their title to the remainder of said tract lying east of said Fox slough to Buell and Fallon, viz., thirty-five acres; and that at the institution of this said suit said defendants, Johnstone and Jungherr, had no title or interest in said southeast quarter, having previously conveyed the same to said Samuel and John McKee and said Buell and Fallon, none of whom are parties to this action, and the court being of opinion that no affirmative relief can be given in this action on the cross-petition to defendants, Johnstone and Jungherr, because, not being the owners of the equitable title, they are not entitled to a decree vesting in them the legal title; nor can relief be given to said McKee, Buell, and Fallon, the present owners of the equitable fee, because they are not parties to this suit.

It is therefore considered that the plaintiff take nothing by his writ in this cause, and that defendants go hence without day, and that defendants have and recover of plaintiff their costs in this suit expended, and that the cross-action by defendants, Johnstone and Jungherr, be dismissed without prejudice to any independent action they may hereafter institute against plaintiff and the vendees of defendants for the relief sought in said cross-action.

58 And afterwards, to wit, at a circuit court continued and held as aforesaid before Hon. John T. Redd, judge as aforesaid, and on Friday, November the 16th, A. D. 1877, the following, among other proceedings, were had, to wit:

Mo. for New Trial.

ALBERT C. WIDDICOMBE, Pl'ff,
vs.
OLIVER P. CHILDERS *et al.*, Def'ts.

At this day come the plaintiff and defendants herein, and each file separate motions for a new trial in this cause, which said motions now coming on to be heard, being seen and duly considered, are by the court overruled. Whereupon come defendants and plaintiff and file bill of exceptions in this cause.

Which said plaintiff's motion is in words and figures as follows, to wit:

In the Circuit — of Marion Co., Mo. July Term, 1877.

ALBERT C. WIDDICOMBE, Plaintiff,
against
OLIVER P. CHILDERS *et al.*, Defendants.

Now comes said plaintiff and moves the court to set aside the verdict in said cause and grant him a new trial herein for the following reasons: First, because the verdict is against the evidence in the case; second, because the court admitted incompetent, irrelevant, and illegal evidence; third, because it rejected legal and competent evidence; fourth, because the verdict is against the preponderance and weight of evidence; fifth, because the verdict is against the law;

sixth, because the verdict is against the law and the evidence; seventh, because the verdict is in favor of defendants, whereas it should have been in favor of plaintiff.

THOS. L. ANDERSON,
Att'y for Pl'ff.

59 Which said defendants' motion is in words and figures as follows, to wit:

In the Circuit Court, Marion County, Missouri. Adjourned July Term, 1877.

ALBERT C. WIDDICOMBE, Pl'ff,
vs.
OLIVER P. CHILDERS, LUCRETIA JUNGHER, SALLIE F. JOHNSON, and H. WILL JOHNSON, Def'ts.

Now come defendants, Lucretia Jungher, Sallie F. Johnson, and H. Will Johnson, and move the court to set aside the order & judgment of the court dismissing the cross-bill in their answer set out herein, and to give them a new hearing thereon and to make a decree granting the relief prayed for in their answer, and they assign the following reasons for their motion: Because under the evidence in the cause the relief prayed for should have been granted; because upon the facts by the court found the relief prayed for by the defendants should have been granted; because the court committed error in dismissing defendants' cross-action.

JAS. HAGERMAN &
ANDERSON & BOULWARE,
Def'd'ts' Att'ys.

Which said bill of exceptions is in words and figures as follows, to wit:

In the Circuit Court, Marion County, Mo. July Term (Adjourned to November, 1877).

ALBERT C. WIDDICOMBE, Pl'ff,
against
OLIVER P. CHILDRESS, LUCRETIA JUNGHER, SALLIE F. JOHNSON, and H. WILL JOHNSON, Def'ts.

Be it remembered that in the progress of the trial of this cause the following proceedings were had, to wit: That on the 16th day of March, during the February term, A. D. 1876, thereof, plaintiff moved the court to set aside its order making Lucretia Jungher, Sallie F. Johnson, and H. Will Johnson codefendants to said cause.

60 Which said motion is in words and figures following, to wit:

Mo. to Set Aside Order Making Jungher & Johnston Parties.

STATE OF MISSOURI, *County of Marion:*

In the Circuit Court. February Term, 1876.

A. C. WIDDICOMBE, Pl'ff,
vs.
OLIVER P. CHILDRESS, LUCRETIA JUNGHER, SALLIE F. JOHNSON, *et al.*, Def'ts.

Now comes plaintiff in the above-entitled cause and petitions the court to set aside the order of said court allowing Lucretia Jungher, Sallie F. Johnson, and H. Will Johnson to be made parties to said cause, for the reason that they are not parties from or through whom the defendant, Oliver P. Childress, claims title to the possession of the premises; and, further, that parties having failed to come in court prior to the rendition of judgment in the circuit court of Clarke county, Mo., October term, 1875, in the said cause, it is now too late, the said judgment having been reversed on the court's own motion and instance, after written confession of judgment by said defendant.

THOS. L. ANDERSON,
Att'y for Pl'ff.

Which said motion the court overruled; and to said ruling the plaintiff then and there excepted and filed exceptions at the time Which said exceptions are in words and figures following, to wit:

In the Circuit Court. February Term, 1876.

A. C. WIDDICOMBE, Pl'ff,
vs.
OLIVER CHILDRESS, LUCRETIA A. JUNGHER, SALLIE F. JOHNSON, and H. W. JOHNSON, Def'ts.

Be it remembered that on this day the motion herein filed to set aside the order making Lucretia Jungher, Sallie F. Johnson, and H. Will Johnson defendants, coming on to be heard, which motion was overruled by the court; to the judgment and decision of the court in overruling said motion plaintiff excepted and prays that this his bill of exceptions may be signed, sealed, and made
61 part of the record, which is accordingly done.

JOHN T. REDD, *Judge.* [SEAL.]

And which said bill of exceptions is endorsed: Filed March 16, 1876. Jos. A. Donley, clerk.

That at the present term of the court the case coming on to be tried and neither party requiring a jury, the following testimony was offered by plaintiff and defendants, and the following proceedings were had:

The defendants offered and read in evidence, first, a certified copy of a cash application, No. 7417, for the W. one-half of section 36, T. 64,

R. 6 W.; also one, No. 7418, for the W. one-half of N. E. qr. of section 36, in T. 64, R. 6 W., in name of Robert Wooden, as referred to in depositions and marked "Exhibits D & E."

Cash Applications 7417 & 7418.

No. 7417.

LAND OFFICE AT PALMYRA, MO., *November 8th*, 1834.

I, Robert Wooden, of Lewis county, Missouri, do hereby apply to purchase the west half of section No. 36, in township No. 64, of range No. 6 west, containing 320 acres, according to the returns of the surveyor general, for which I have agreed with the register to give at the rate of $1.25 per acre.

ROBERT WOODEN.

I, William Wright, register of the land office, do hereby certify that the lot above described contains three hundred and twenty acres, as mentioned above, and that the price agreed upon is $1.25 per acre.

WM. WRIGHT, *Register.*

I do solemnly swear that since the first day of January, 1834, viz., on or about the 7th day of November, 1834, I personally inspected the tract of land designated in the annexed application, viz., the west half of section No. 36, in township No. 64, of range No. 6 west, in the district of lands subject to sale at Palmyra, and that there was not at that time any person residing thereon or cultivating the same, and I do not believe that any pre-emption right exists thereto either under the act of 29th May, 1830, or that of 19th June, 1834.

62

ROB'T WOODEN.

STATE OF MISSOURI, } *sct:*
County of Marion, }

Subscribed and sworn to before me, at Palmyra, 8th November, 1834.

[SEAL.] EDWIN G. PRATT,
Notary Public.

EXHIBIT "D." (D. A. McMillan, Notary Public.)

U. S. LAND OFFICE,
BOONVILLE, MO., *January the 25th*, 1877.

I, Gustave Reiche, register of the U. S. land office at Boonville, Mo., do hereby certify the foregoing to be a true copy of the original application, No. 7417, by Robert Wooden, and his affidavit thereto attached, and as fully and correctly as the same remain on file in this office, formerly Palmyra, Mo., office.

In testimony whereof I have hereto subscribed my name (there being no official seal in use in this office), at office, in Boonville, Mo., the day and year last above written.

GUSTAVE REICHE, *Register.*

No. 7418.

LAND OFFICE AT PALMYRA, MO., *November* 8, 1834.

I, Robert Wooden, of Lewis county, *county* Mo., do hereby apply to purchase the W. one-half of the N. E. qr. section No. 36, in township No. 64, of range No. 6 west, containing 80 acres, according to the returns of the surveyor general, for which I have agreed with the register to give at the rate of $1.25 per acre.

ROBERT WOODEN.

I, William Wright, register of the land office, do hereby certify that the lot above described contains eighty acres, as mentioned above, and that the price agreed upon is $1.25 per acre.

WM. WRIGHT, *Register.*

63 I do solemnly swear that since the first day of January, 1834, viz., on or about the 7th day of November, 1834, I personally inspected the tract of lands designated in the annexed application, viz., the W. one-half of N. E. qr. of section No. 36, in township No. 64, of range No. 6 west, in the district of lands subject to sale at Palmyra, and that there was not at that time any person residing thereon or cultivating the same, and I do not believe that any pre-emption right exists thereto, either under the act of 29th May, 1830, or that of 19th June, 1834.

ROB'T WOODEN.

STATE OF MISSOURI, *County of Marion,* } *sct:*

Subscribed and sworn to before me, at Palmyra, 8th November, 1834.

[SEAL.] EDWIN G. PRATT,
Notary Public, Mo.

U. S. LAND OFFICE,
BOONVILLE, MISSOURI, *January the 25th,* 1877.

I, Gustave Reiche, register of the U. S. land office at Boonville, Mo., do hereby certify the foregoing to be a true, full, and correct copy of the original application, No. 7418, by Robert Wooden, and his affidavit thereto attached, as they remain on file in this office, formerly Palmyra, Mo., office.

In testimony whereof I hereto subscribe my name (there being no official seal in use in this office), at office, in Boonville, Mo., the day and year last above written.

GUSTAVE REICHE, *Register.*

EXHIBIT "E." (D. A. McMillan, Notary Public.)

Register's Abstract of Entries.

Second. A certified copy of register's abstract of entries of the foregoing lands in name of said Wooden, referred to as Exhibit F in deposition, which said abstract is in words and figures as follows, to wit:

When sold.	Number of receipt & certificate.	By whom purchased.	Residence.	Tract purchased. Section or part of section.	No. of section.	No. of township.	No. of range.	Acres.	Price per acre.	Am't of purchase money.
1834.		*Name.*								
Nov'b'r 8th.	7417	Robert Wooden	Lewis Co., Mo.	West half	36	64	6 west	320	$1 25	$400
" "	7418	Ditto.	Ditto	W. ½ N. E. ¼	36	64	6 "	80	" "	80
1836.										
July 6th.	14513	Edward Jenner Smith	Ditto	E. ½ S. E. 30, E. ½ S. E. 31, E. ½ N. E. & E. ½ S. E. 25, E. ½ N. E. & S. W. ¼	36	64	6 "	560	" "	700

U. S. LAND OFFICE,
BOONVILLE, MO., *January the 25th*, 1877.

I, Gustave Reiche, register of the U. S. land office at Boonville, Mo., do hereby certify that the foregoing is a true and correct copy from the register of cash entries of the former Palmyra, now Boonville, Mo., U. S. land office, and as fully as the said entries Nos. 7417, 7418, & 14513 appear thereon of record.

In testimony whereof I have hereto subscribed my name (there being no official seal in use in this office), at office, in Boonville, Mo., the day and year last above written.

GUSTAVE REICHE, *Register.*

Third. An exemplification of patent No. 7417 from the General Land Office for above land to Robert Wooden, which said exemplification is in words and figures as follows, to wit:

Patent 7417.

Certificate No. 7417.

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, Greeting:

Whereas Robert Wooden, of Lewis county, Missouri, has deposited in the General Land Office of the United States a certificate of
65 the register of the land office at Palmyra whereby it appears that full payment has been made by the said Robert Wooden according to the provisions of the act of Congress of the 24th of April, 1820, entitled an act making further provision for the sale of the public lands, for the west half of section thirty-six, in township sixty-four of range six west, in the district of lands subject to sale at Palmyra, Missouri, containing three hundred and twenty acres according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Robert Wooden:

Now know ye, that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted and by these presents do give and grant unto the said Robert Wooden and to his heirs the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Robert Wooden and to his heirs and assigns forever.

In testimony whereof, I, Martin Van Buren, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the 10th day of April, in the year of our Lord one thousand eight hundred and thirty-seven, and of the Independence of the United States the sixty-first.

By the President:

MARTIN VAN BUREN,
By A. VAN BUREN, *Secretary.*

Recorded vol. 15, page 188.

SAM'L D. KING,
Acting Recorder of the General Land Office ad interim.

B. W. E. L.

66 G. W. McC. 7417.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *April 2nd*, 1875.

I, S. S. Burdett, Commissioner of the General Land Office, do hereby certify that the annexed with "commissioner" erased is a true and literal exemplification from the record in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above mentioned.

[L. S.] S. S. BURDETT,
Commissioner of General Land Office.

To each and all of the foregoing evidence, excepting so much thereof as shown in Exhibit "F" as relates to the cash entry No. 14513 to Edward Jenner Smith of the E. one-half of S. E. q'r of section 30; E. one-half of S. E. q'r 31; E. one-half of N. E. q'r and E. one-half of S. E. q'r section 25, and E. one-half of N. E. q'r and S.W. q'r of section 36, T. 64, R. 6 W., as shown in said Exhibit of Register of Entries.

Plaintiff objected and took exceptions at the time for the following reasons: That the said evidence is irrelevant and immaterial to the issues in this cause. A purchaser's application and the register's abstract of entries are not of themselves evidence in a U. S. Land Office sufficient to indicate a disposition of the public land, though a patent may have subsequently issued concurrent action of both register and receiver is not shown thereby, nor the receipt of the purchase-money by the receiver.

Fourth. A certified copy of application No. 14513 of Edward Jenner Smith for the E. one-half of S. E. q'r of 30; E. one-half S. E. q'r section 31; E. one-half of N. E. q'r and E. one-half of S. E. q'r section 25, and one-half of N. E. q'r and S. W. q'r of section 36, T. 64, R. 6 W., as appears on the files in register's office, and
67 marked Exhibit "C;" which said certified copy of application No. 14513 is in words and figures as follows, to wit:

No. 14513.

LAND OFFICE, PALMYRA, MO., *July* 6, 1836.

I, Edward Jenner Smith, of Lewis county, Missouri, do hereby apply to purchase the E. half S. E. qr. 30, E. half S. E. qr. 31, E. half N. E. qr. and E. half S. E. qr. 25, E. half N. E. and S. W. qr. of section 36, in township 64, range No. 6 west, of the fifth principal meridian, containing 560 acres, according to the returns of the surveyor general, for which I have agreed with the register to give at the rate of $1.25 per acre.

EDWARD JENNER SMITH.

I, William Wright, register of the land office, do hereby certify that the lot above described contains five hundred and sixty acres, as mentioned, and that the price agreed upon is $1.25 per acre.

WM. WRIGHT, *Register.*

U. S. LAND OFFICE, BOONVILLE, Mo.,
January the 25, 1877.

I, Gustave Reiche, register of the U. S. land office at Boonville, Mo., do hereby certify the foregoing to be a true and correct copy of the original application, No. 14513, by Edward Jenner Smith, and as fully as the same remains on file in this office, formerly Palmyra, Mo., office.

In testimony whereof I hereto subscribe my name (there being no official seal in use in this office), at office in Boonville, Mo., the day and year last above written.

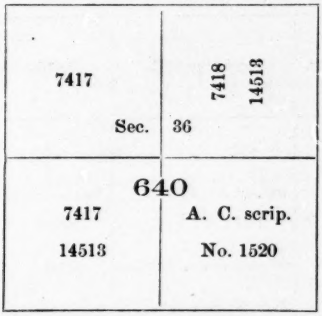
GUSTAVE REICHE, *Register.*

(EXHIBIT C.—D. A. McMillan, Notary Public.)

Copy of Plat Book.

Fifth. A certified copy from the original plat book in register's office relating to the posting or marking up of entries in section 36, township 64, range 6 W., and marked Exhibit "A," which certified copy from the original plat book is in words and figures as follows, to wit:

Township No. 64 *North of the Base Line, Range No.* 6 *West of the* 5*th Principal Meridian.*



68 Pursuant to a contract with and instructions from Wm. Bates, surveyor of the lands of the U. S., in the State of Illinois and Territories of Missouri & Arkansas, bearing date the 27 day of October, 1817, we have admeasured, laid out, and surveyed the above-described township, and hereby certify that it had such marks and bounds, both natural and artificial, as are represented on said plat and described in the field notes made thereof, and returned

with this plat into the office of the surveyor of the lands of the U. S. for the State of Illinois and Territories of Missouri & Arkansas, certified this 1 day of May, 1820.

THOS. C. RECTOR,
D. Surveyor.
STEPHEN RECTOR.

Examined.
WM. RECTOR.

U. S. LAND OFFICE, BOONVILLE, Mo.,
January the 25, 1877.

I, Gustave Reiche, register of the U. S. land office at Boonville, Mo., do hereby certify that the above and hereto attached diagram, with surveyor's certificate, is a true, full, and correct copy of sec. 36, from the plat of township 64 north, of range No. 6 W., 5th pr. meridian, as fully as they appear on said plat now on the official files of said office.

In testimony whereof I have hereto subscribed my name (there being no official seal in use in this office), at office in Boonville, Mo., the day and year last above written.

GUSTAVE REICHE, *Register.*

Sixth. A certified copy of the original tract book in the register's office, showing entries in section 36, T. 64, R. 6 west, and marked Exhibit "B," which said certified copy of the original tract book is in words and figures as follows, to wit:

69 EXHIBIT B. D. A. McMillan, notary public.

Copy of Tract-Book.

Section.	Township.	Range.	Quantity.	To whom sold.	Residence.	When sold.
			Acres.			
36	64	6 W.	640			
West half			320	Robert Wooden	Lewis county, Mo.	November 8th, 1834.
West ¼ N. E. ¼			80	Ditto.	Ditto	" "
E. ½ N. E. & S. W. ¼			240	Edward Jenner Smith	Ditto	July 6th, 1836.
S. E. ¼ N. E. & S. W. ¼			160	A. C. Widdecombe	A. C. scrip, K'y, No. 1520, R. & R. No. 1871	May 10th, 1871.

U. S. LAND OFFICE,
BOONVILLE, Mo., *January the 25th*, 1877.

I, Gustave Reiche, register of the U. S. land office at Boonville, Mo., do hereby certify that the foregoing is a true and correct copy of all the entries in sec. 36, t'p 64, R. 6 west, and as fully as they

appear on the tract-book of the former Palmyra, now Boonville, Mo., U. S. land office of records.

In testimony whereof I have hereto subscribed my name (there being no official seal in use in this office), at office in Boonville, Mo., the day and year last above written.

GUSTAVE REICHE, *Register.*

Each and both of Exhibits "A and B," as above set forth, were objected to by plaintiff and exceptions taken, for the reason that the same is secondary evidence as to the issues in this case and are not the best evidence of records in the U. S. land office of which the case in its nature is susceptible.

Seventh. A certified copy of the register of receipts issued by the receiver of public moneys, of receipt No. 14513, to Edward Jenner Smith for the same lands, as shown in his application, marked Exhibit "C," which said certified copy of the register of receipts
70 of receipt No. 14513 is marked Exhibit "G," and is in words and figures as follows, to wit:

EXHIBIT G.—D. A. McMillan, Notary Public.

Register of Receipts Issued by the Receiver of Public Moneys at ——, ——, for Lands Sold from the — day of ——, ——, to the — day of the same month, inclusive.

Date of receipt.	No. of receipt.	By whom purchased.	Residence.	Tract purchased. Section or part of section.	No. of section.	No. of township.	No. of range.	Quantity.	Price per acre.	Purchase money.
		Name.						*Acres.*		
1836.	*	* * * *	* * *	* * * *	*	*	*	*	*	*
July 6.	14513	Edward Jenner Smith ..	Lewis county, Mo.	E. ½ S. E. 30. E. ½ S. E. 31. E. ½ N. E. E. ½ S. E. 25. E. ½ N. E. and S. W. qr....	36	64	6 W.	560	$1 25	$700
*	*	* * * *	* * *	* * * *	*	*	*	*	*	*

U. S. LAND OFFICE,
BOONVILLE, MO., *January* 25, 1877.

I, Gustave Reiche, register of the U. S. land office at Boonville, Mo., do hereby certify the foregoing to be a true and correct copy from the receiver's monthly report and as fully as it appears thereon of record of this office, formerly Palmyra, Mo., land office, as far as said report on entry No. 14513, by Edward Jenner Smith, is concerned.

In testimony whereof I have hereto subscribed my name (there being no official seal in use in this office), at office, in Boonville, Mo., the day and year last above written.

GUSTAVE REICHE, *Register.*

Eighth. Deposition of John N. Gott, which deposition is in words and figures as follows, to wit:

Deposition of J. N. Gott.

In the Circuit Court of Marion County, Missouri. February Term, A. D. 1877.

A. C. WIDDICOMBE, Pl'ff,
against
OLIVER CHILDERS and Others, Def'ts.

To above-named plaintiff, A. C. Widdicombe:

You are hereby notified that the depositions of witnesses to be read in evidence in the above cause on the part of defendants will be taken at the office of the register of lands of the United States, in the city of Boonville, in the county of Cooper, in the State of Missouri, on the 25th day of January, A. D. 1877, between the hours of 8 o'clock in the forenoon and 6 o'clock in the afternoon of said day, and the taking of the said depositions, if not completed on that
71 day, will be continued from day to day, at the same place and between the same hours, until completed.

ANDERSON AND BOULWARE,
P. T. LOMAX, AND
JAMES HAGERMAN,
Att'ys for Defendants.

I accept service of above notice this 17th day of January, A. D. 1877.

A. C. WIDDICOMBE.

Depositions of witnesses produced, sworn, and examined on the 25th day of January, in the year of our Lord 1877, between the hours of 8 o'clock in the forenoon and six o'clock in the afternoon of that day, at the office of the register of lands of the United States, in the city of Boonville, county of Cooper, and State of Missouri, before D. A. McMillan, a notary public within and for the said county of Cooper, in a cause now depending in the circuit court of Marion county, State of Missouri, between Albert C. Widdicombe, plaintiff, and O. P. Childers and others, defendants, on the part of defendants:

JOHN N. GOTT, of lawful age, being produced, sworn, and examined, on his oath says:

My name is John N. Gott; age is forty-three years, past, and my occupation is that of clerk and my residence is the city of Boonville, Cooper Co., Mo. I was appointed receiver of the United States land office, at Boonville, Mo., in the spring of 1870, and continued to hold that position for four years. I am acquainted with the plaintiff, A. C. Widdicombe, and have been since before I went into the land office in 1870. Mr. Widdicombe was residing in Boonville when I first came to Boonville in the spring of 1866; he has been a prac-

ticing attorney at law since I have known him; I believe his practice has been more pertaining to land titles and matters before the United States Land Office; he might be called a land lawyer; he practiced before the State and Federal courts and in the general and local land offices; he has been plaintiff in a few land cases, to my knowledge; he has had cases for other parties before the land
72 offices and State and Federal courts; I don't think I could name a case now which he has taken to the State or Federal courts; he has been practicing before this local land office here in Boonville, and has had more or less business before it; he has, to my knowledge, carried cases before the General Land Office, at Washington, D. C., for other parties. During the earlier part of my acquaintance with plaintiff his brother-in-law, George W. Boardman, was register of this land office at Boonville; he was register, to the best of my recollection, from the early part of 1861 until the summer or fall of 1866. George W. Boardman was not, after that, with the General Land Office, at Washington, D. C.

Question. What did you hear Mr. Boardman say as to his connection with the General Land Office, at Wash., D. C.

Obj. to by defendants' attorneys, on the ground that it is hearsay.

Obj. sustained.

Answer. I heard him say he had charge of a division of the General Land Office before he was appointed register at Boonville, Missouri. During my connection with the Boonville land office as receiver plaintiff entered quite a number of tracts; he entered some tracts which proved in conflict — prior entries or claims; these conflicts were not confined to entries made by plaintiff, but happened with other entries made by other parties; these conflicts happened more frequently with plaintiff for the reason he made more entries. During the time I was receiver of the land office he was frequently at the land office examining the records of the office; he spent a good deal of time at the office; his office was not more than two blocks away from the land office; his office at the present time is, I believe, next door to the land office.

His fortunate adventures in entering land in thickly settled parts of the State and trying to secure the legal title to same has been the subject of remark in this community. During the time I was
73 receiver of the land office here, a communication was received from the General Land Office by the register notifying this office that plaintiff had been excluded from practicing before that office; the register informed me of the letter; it was received, I think, in the winter of 1873 & '4; I don't now recollect of any case which he has had except before the said office. I know of one case, when Widdicombe procured a patent for land which had been before entered by other parties, and had been owned and occupied by them for a long time, and was in cultivation. This farm was in Howard county, in this State, across the river; there was a litigation about this matter, which resulted in his defeat.

Paper shown witness, which is marked Exhibit "A." Witness continued:

This is a certified copy of the original plat of section 36, town 64, range 6 west. I am familiar with the original plat-books now in the office of the United States land office at Boonville, Mo. I have a fair average knowledge of different handwritings. I have been, in addition to being reeeiver of the land office, bookkeeper in the Central National Bank, and am familiar with different handwritings.

Question. Will you turn to the original plat, of which Exhibit "A" is a copy, and say whether or not upon the southeast quarter of section 36 thereof there has been any erasure?

Witness examines original plat.

Answer. I should say there has been an erasure on the southeast quarter of section 36. I am certain of it.

Ques. Look at Exhibit "A" and state where the erasure occurs on the original plat.

Ans. Partly under the figures No. 1,520 and between said figures and the letters A. C. scrip above.

Ques. State how plain this erasure is.

Ans. It is perfectly apparent to the naked eye.

Ques. Look at the original plat and examine the figures on the southwest quarter of section 36, No. "14,513," and on the east half of the northeast quarter, section 36; also examine figures "14,513," and state whether or not they are in the same handwriting.

74 Ans. I should say that they were made by different parties; I am certain of it. The figures on the southwest quarter appear to be in a darker ink than those on the east half of northeast quarter of same section, and they are of a different construction. I could not say that it was intended to make them look alike. There is a general similarity in the figures, but there is a difference in construction; the difference is very visible to me, but might not be observed by a casual observer.

Ques. Look at the figures 7417, on the southwest quarter and northwest quarter, and the figures 7418 on the west half of northeast quarter, section 36, and state whether they are in the same handwriting with the figures "14513," in the east half of the northeast quarter of said section 36, or are they in the same handwriting as the figures "14513," in the southwest quarter of said section 36?

Ans. I believe the figures "7417" and "7418" and the figures "14513," in the east half of the northeast quarter of said section, to be in the same handwriting and in a different handwriting from the figures 14513 on the southwest quarter of said section 36.

Ques. On the original plat in what ink are the words A. C. scrip and the figures No. 1520 on said southeast quarter of section 36 written?

Ans. They appear to have been written with red ink.

Question. In whose handwriting are they?

Answer. I could not say in whose handwriting they are made.

Question. Who was register in the Boonville land office at the time you were receiver?

Answer. William Whist and E. G. Evans.

Question. Are these words in either of the handwriting of these parties?

Answer. They are not.

Witness shown paper, which is marked Exhibit "B."

Ques. State what this paper is.

75 Ans. It is a certified copy of all the entries in section 36, township 64, range 6, as same appear upon the original tract book of the former Palmyra and Boonville United States land office.

Ques. Turn to the original tract-book from which the copy is made and state what you see there in the way of erasure or change of words or letters as originally written thereon.

Witness examines the original tract-book and identifies it.

Answer. I observe that the description of the southwest q'r in section 36, town. 64, range 6 west, in the entry by Edward Jenner Smith, has been changed from what it originally was.

Question. Look at the original tract-book and at Exhibit "b," and state in what particular part of said entry the change has been made.

Answer. In said description "E," one-half N. E. & S. W. q'r, as it now appears on the original tract-book and on Exhibit B, the letter "W" of said description appears to be substituted for some other letter previously erased.

Question. In what kind of ink is the letter "W" in the description on said original tract-book?

Answer. It appears to be of a darker color than the other letters of said entry, and in a heavier and different handwriting, and has a much fresher appearance.

Question. Is the erasure of some other letter and the substitution of the "W" apparent to the casual observer?

Answer. I should say that it was.

Question. On the original tract-book in what kind of ink is the entry of the southeast quarter to A. C. Widdicombe?

Answer. It appears to have been made with red ink.

Witness shown paper which is marked Exhibit "C."

Question. Please state what this paper is, if you know.

Answer. It appears to be a certified copy of the original cash application No. 14513, made by Edward Jenner Smith.

76 Witness shown paper.

Question. Please state what this paper is.

Answer. It is the original of Exhibit "C," now on file in the land office at Boonville.

Question. Look at the original application and the entries in the original tract book of which Exhibit "B" is a copy, except the entry to A. C. Widdecombe, and compare the handwriting and say whether or not the handwriting is the same.

Answer. The writing in the original application, except the sig-

nature of applicant and the substituted letter "W," and that upon the original tract book pertaining to the application of Robert Wooden and Edward Jenner Smith appear to be in the same handwriting.

Witness shown papers which are marked Exhibits "D" and "E."

Question. Will you compare the original of Exhibits "D" and "E" with the original of Exhibit "C" and the original entries on the tract book pertaining to the entries of Robert Wooden and Edward Jenner Smith, and state whether they are all in the same handwriting except the signature of the applicants and the letter "W," to which you have referred.

Answer. They are all in the same handwriting, except the signatures of applicants and the substituted letter "W," referred to by me.

Question. Look at the original of Exhibit F (which is handed witness), and state in what handwriting the original is, and state also what the original is.

Answer. The original is a register of cash certificates issued by the registers and the handwriting is the same as the originals of Exhibits B, C, D, & E, except the signatures of applicants and the substituted letter "W," and except the entry of Widdicombe in Exhibit "B."

77 Question. In whose handwriting is the original of Exhibit F?

Answer. I should say from comparison that it was in the handwriting of the register, Wm. Wright.

Question. Please state how the entries to Wooden and Edward Jenner Smith, shown in Exhibit "F," appear with reference to each other upon the original registry of entries of certificates.

Answer. They appear to be in the same handwriting and upon different pages of said register and at different dates.

Question. Are you familiar with the mode of making entries in the land offices of the United States?

Answer. I am acquainted with the present mode of making entries in this office at Boonville.

Question. Were you familiar with the mode of making entries at the time Edward Jenner Smith made his entry—say in 1836 or prior thereto?

Answer. It appears from the records that as far back as 1834 the entries were made in the same manner as at the present time.

Ques. Look at the originals of Exhibits "A" and "B," "C" and "F," and state which of the parts thereof relating to the entry of Edward Jenner Smith is the first and original entry made by the register.

Ans. That part of original Exhibit "B" which refers to the entry of Edward Jenner Smith is the first and original entry made by the register.

Ques. Am I to understand that that part of the original of Exhibit "B" relating to the entry of Edward Jenner Smith as it stood before the erasure and substitution of the letter W, to which you

have testified, as the part first written by the register or the original entry by the register?

Ans. Yes; I should say that it was.

Ques. State the mode, as you understand it, of making cash entries.

Ans. On the presentation of an application to the register for a cash entry the register first examines the plat book and then the tract book; if the land applied for appears to be subject to entry he makes record in the tract book, giving a description of the land applied for, the area, to whom sold, the date of the application, and the residence of the applicant; then he marks upon the plat
78 the current number of the entry; then he certifies to the number of acres so entered and the price paid for the same, upon which application and certificate of the register the receiver issues a receipt to the applicant for the money paid for the land as certified to by the register.

Ques. Describe the tract book to which you refer, stating how it is arranged.

Ans. It is a record containing the sections of land arranged, numerically, with the original entries made in each section, as indicated in Exhibit "B."

Question. When a party comes to the land office to ascertain what land has been entered at what book does he look.

Answer. The plat book would be the first book he would examine; then, to ascertain more definitely, he would refer to the tract book.

Ques. Suppose that Edward Jenner Smith came to the land office on the 6th day of July, 1836, for the purpose of entering land, what land would have been shown by the plat book and the tract book to be for sale in section 36, township 64, range 6?

Ans. I would say, from the appearance of the records, that the southeast quarter and east half of northeast quarter of said section appeared to be undisposed of at that date.

Question. Is it not probable, from the records, that Edward Jenner Smith did look at the tract book and plat of said section 36 before he made his application?

Answer. I should think it probable that Edward Jenner Smith had examined the tract book and plat prior to or on the day of the entry.

Question. The body of the application of Edward Jenner Smith is in the handwriting of the register, is it not?

Answer. I should say that it was.

79 Ques. Suppose that the part of the original of Exhibit "B" relating to the entry of Edward Jenner Smith, containing the description of the land, was originally written by the register the east half of the northeast quarter and southeast quarter, section 36, township 64, range 6, and at the same time the register entered upon the original of Exhibit "A," on the southeast quarter of said section, the number 14513 of entry of said Smith, are not the probabilities that the register intended to sell and the said Smith intended to buy the said southeast quarter and not the southwest quarter, and that the register made a mistake in filling out the body of application of said Smith? In answering this question take into

consideration the fact that the tract book, only two lines above the entry of said Smith, shows that the southwest quarter had been previously entered by Robert Wooden.

Question objected to by plaintiff, for the reason that it is putting a hypothetical case and is not evidence and is contrary to the rules of evidence.

Ans. In my opinion, judging from the dates and descriptions as given in said section 36, *that* Edward Jenner Smith intended to enter the southeast quarter and east half of northeast quarter of said section 36, and that the register intended to sell said tracts, and that the register committed an error in filling out the application, for the reason that the tract book and plat showed plainly that the west half of said section had previously been disposed of.

Question. Do you know how the certificates that have been sent to the different counties in this State containing the plat and the names of the parties who originally entered the land have been made up?

Answer. The plats furnished the different counties are supposed to be exact copies of the original plat of survey as to sectional lines, river boundaries, and area of fractional tracts, with the names of the parties who had purchased lands written upon each tract; the names are obtained from the tract book.

80 Question. Suppose the certified copy referred to above, which was sent from this office or the land office at Palmyra to Clarke county, Missouri, showed that all of said section 36 had been entered, the west half and the west half of the northeast quarter by Robert Wooden, and the east half of the northeast and the southeast by Edward Jenner Smith, what would you say was shown by the tract book and plat of surveys in this land office at the time such copy was made?

Objected to by plaintiff for the reasons above stated, and, further, because it is based upon no facts about which the witness has any knowledge.

Answer. If a certified copy of the original plat was made and certified and sent to Clarke county it is probable that it conformed to the original entries on the tract book and plat book at the time it was made.

Question. From your knowledge of the mode of making entries of land, and the records and exhibits referred to in your testimony in this case, is it not probable that the register, at the time Smith entered his land and Smith examined the plat and tract book and made the proper entries thereon relating — said southeast quarter, and then immediately wrote out the application, and, in writing out said application, made the mistake in inserting therein the southwest instead of the southeast quarter-section?

Objected to by plaintiff for the reason that question is putting a hypothetical case to witness, and is not the best evidence, and is incompetent, as the record evidence is here to establish the point in question.

Answer. Such a course of proceeding might have been possible, but not altogether probable.

Question. Do the records show that from the years 1834 to 1836, inclusive, there was a very large number of entries made at
81 the land office at Palmyra, Mo.?

Answer. I should say that there was a large number made, judging from the large increase of the current number of entries made from the entry of Wooden to the entry by Smith.

Cross-examination by PLAINTIFF personally:

When I said in my direct examination that plaintiff's business referred to land titles I referred to examination of land titles and acting as agent for other parties. As much as three-fourths of the business done by you was done for other parties, acting as their agent. I believe during my connection in the land office all the attorneys at Boonville had business before the office. I don't think there was any exception. There were during my official term parties residing here who made matters before the general & local land offices a specialty. Prior to my connection with the office there were some parties here who entered a good deal of land. James M. Nelson entered land running up in the hundreds; Joseph L. Stephens, Henry Elliott, Nathaniel Leonard, and Wm. H. Trigg; these parties made the largest number of entries; George Mellor, J. F. Gruelich, and Walz & Bremmson also made some entries, but not so much as the first named; J. L. McFadden made some entries while I was receiver; also Mr. Sensendeffer made entries; also J. L. O'Bryan, Rose L. Baker, Miller and Gardner, & John R. French. In many instances the lands were located in thickly settled portions of the State, and some of them in this county. All of these parties have made entries since my residence at Boonville. There was a good many entries made through the Central National Bank here for other parties, of which J. L. Stephens is president. A number of entries were made for other parties by Wm. H. Trigg & Co.
82 I remember of W. H. Trigg & Co. entering one tract where there was a memorandum on the tract-book where a former entry had been suspended. This tract was in this county, where it was supposed there was no vacant lands. I never saw the county plats. I know there are such plats supposed to contain the land in this county, but I never made a personal examination of them. These plats were, I suppose, similar to those testified to in my direct examination. I remember of fractional tract of 120 acres being entered in the neighborhood of Pilot Grove, in this county, during my term of office. I don't recall any other entries in this county. A small tract was entered immediately across the river from Boonville, in Howard county. I remember of James Harrison, of St. Louis; John C. Bender, of St. Joseph; C. H. Comstock, Albany, Mo.; Alonzo H. Thompson, ex-auditor of State; J. F. Bryant, of Betheny, Mo., entering land at this office. The most of the tract entered by these parties were situated in those parts of the State where there was supposed to be no vacant lands. Some considerable time was spent by the agents of Mr. Harrison examining the records

of the office as to vacant land and discrepancies in entries. I remember Mr. Sensendoffer spent a good deal of time at the office and made the entering of land a specialty. He was off and on about the office for about two years. Alonzo Thompson made a number of entries at that time for the purpose of speculation. He made frequent visits to this office, and made his entries in those portions of the State where it was supposed there was no vacant land. I remember of his entering one tract of 80 acres near Marshall, in Saline county, Mo., in a thickly populated neighborhood and considered a very valuable tract. I remember one entry made by John C. Bender, of St. Joseph, which was supposed to be very valuable, being situated in a thickly settled portion of the State. The number of entries made by plaintiff were not subject to conflict any more frequently than those made by other parties in proportion to the
83 number made. I remember the application of the sheriff and another party for a tract of land in Scotland Co., in a section where it was not supposed there was any vacant land. Plaintiff was the attorney for the party, who ultimately recovered the land. The land office was not situated in the Thespian Hall all of my term. A part of the time plaintiff had his office in Fetzer block, & a part of the time at Aehle, Dunica & Co.'s bank, and a part of the time at his residence. I don't know of any attorney having his office at the court-house at this time. Plaintiff's office is now the nearest law office to the court-house; it is in close proximity to the court-house. There were other parties residing at Boonville who have made entries the character of which were quite as notorious, if not more so, than many of those made by the plaintiff.

Had it not been for the close scrutiny of the records exercised by the parties herein before mentioned there would be at the present time a vast amount of territory undisposed by the Government. At the time notice was received at this office that plaintiff had been excluded from practicing before the General Land Office; Willis Drummond was Commissioner. I have a slight personal acquaintance with him. I have understood trouble existing between plaintiff and the General Land Office grew out of matters of a personal character between plaintiff and Willis Drummond, the then Commissioner. I have understood that Commissioner Drummond afterwards resigned. I have been credibly informed that Commissioner Drummond's resignation was forced upon him through his improper connection with the receiver of the land office at Springfield, Mo. I saw it reported in the newspapers that Drummond had entered a tract of land in the city of Chicago since his resignation of the Commissionership. I have seen his advertisement as a practicing attorney before the General Land Office at Washington, D. C., since he was Commissioner. At the time the communication came from the General Land Office
84 notifying the register, Evans, of the Boonville land office, that plaintiff had been debarred from practicing before the General Land Office. James H. Baker, a former register of the Boonville land office, at Boonville, Mo., was Commissioner of Pensions at Washington, D. C., and had his office on the same floor and

adjacent to the office of Commissioner Drummond. My first introduction to Commissioner Drummond was through Jas. H. Baker, who formerly resided here. The Rose L. Baker to whom I have referred as having made entry of lands at the Boonville land office was the wife of James H. Baker. Plaintiff was, I remember, the employed attorney of parties in this State who had attached some of the entries made by Rose L. Baker. I was aware that there were unfriendly feelings existing between Jas. H. Baker and plaintiff at this time. I was also aware of the complaints and partial evidence being submitted as to a portion of the entries made by Rose L. Baker, which caused their suspension for a time, which were afterwards patented. From my own observation I should infer that Commissioner Drummond and Jas. H. Baker were on friendly terms. I remember of seeing an article in some paper reflecting upon the character of Jas. H. Baker some time in the year 1873 or 1874. The communication to Register Evans in relation to the debarment of plaintiff from practicing before the General Land Office stated, in addition, that the register should use vigilance in observing the movements of the plaintiff while about the land office at Boonville, or words to that effect. I think this communication was a voluntary letter from Commissioner Drummond. I remember of some instances now where plaintiff was employed in the local courts. I remember of one case where there was considerable property involved; the suit was against a man by the name of Moore, in this county. I think some $20,000 was involved. Judgment was obtained against Moore. The suit caused considerable remark in
85 this community. I remember another case in which the plaintiff was attorney for a Mr. McPherson, involving the City Hotel property in Boonville. I remember plaintiff going to Maryland in this case in the interest of his client. Plaintiff was also attorney for the estate of E. B. McPherson, late receiver of this office. I have seen circulars wherein plaintiff advertised that he made land matters a specialty. Plaintiff also advertised to do a general law business; other attorneys advertised to do business in a similar manner. At the time plaintiff entered the tract in Howard county, referred to by me in my direct examination, the records of this office upon which the entry was made showed that the land was vacant. I don't believe that plaintiff would enter lands upon which there was prior valid claim. I was receiver of this office for four years. The duties of receiver and register are quite different as to their clerical duties. There is a slight difference in the record books. The duty of receiver is to keep a correct account of the moneys received at land office and account for same. Under the present custom of doing business in the land office I would say I was equally familiar with the duties of register as receiver. I did the duties of register for about four months. I consider myself a fair expert as to handwriting. It frequently occurs that there are erasures on the tract and plat book of this land office.

Question. Referring to original township plat of town 64, range 6 west, of which Exhibit "A" is a partial copy, *and* state whether

or not there are other erasures apparently of a similar nature as that in section 36, same township and range.

Answer. I observe other erasures in said township and range.

86 There seems to be an erasure in the southeast quarter of the southeast qr. of section 8 in said township; this number of entry on said tract being 7946; the date of the entry as appears by reference to the registry of entries and tract book is March 20th, 1835; there also appears an erasure in the northeast — of the southwest quarter of section 24, same township, in which the number of entry — 19457; by reference to the tract book the date appears to be May 28, 1838; there is also an erasure on the southeast — of the southwest quarter, same section, township, and range, in which the number of the entry is 8495; by reference to the tract book the date appears to be June 8th, 1835.

Question. Are not those erasures apparently made prior to said figures being placed thereon, and are not said figures apparently in the same handwriting of contemporaneous entries of that date?

Answer. I should say that they were.

Question. Are they in the same handwriting as the originals of Exhibit "A?"

—. I should say that they were, except the number 14513 on the southwest qr. of section 36, and upon the southeast qr. the number 1520.

Question. Are said erasures equally as perceptible as those referred to in your direct examination?

Answer. I should say that they were.

Question. I would ask you to refer to the tract book and register and examine the entry of the northeast — of southwest quarter of section 24, t'p 64, R. 6, and does not the entry on that section appear in the same handwriting as contemporaneous entries, as referred to in Exhibit "A," and is not the ink of a much blacker shade than the others on the same page and more resembling the ink of the letter "W" on the original of Exhibit "B?"

Answer. The handwriting is the same as the original of Exhibit "A," and that the shade of ink of said entry is of a darker hue than the other entries recorded in the same section and has strong similarity — the "W" of section 36, same town. & range, with the exception that it might be considered of a greater age.

87 Question. Would not the writing of the letter "W" in said section 36 made over an erasure with similar ink, as in the entry above referred to in section 24, naturally appear fresher than said entry made on clear paper, even if made at the same time?

Answer. I should say it would have a fresher appearance.

Witness' attention called to original township 64, range 7 west.

Question. Point out any erasure on said plat whereon subsequent figures denoting cash entries have been made.

Answer. Upon southeast — southeast quarter of section 11 appears an erasure and subsequently a number made thereon; the number appears to be 41613.

Question. Refer to that number on the register of sales or cash certificates.

Answer. I find that the entry was made by George M. Irvine, November 23d, 1871.

Question. Refer to tract book of township 64, range 6, of which Exhibit "B" is a partial copy, and note what erasures you see there other than in section 36, heretofore testified to.

Answer. The east half of southeast quarter of section 14 appears to have been changed in description from what it originally was and is apparently in the same handwriting and in the same ink, but with a heavier stroke of the pen, rendering the ink a darker hue than contemporaneous entries in same section; the date of said entry appears to be May 9th, 1838; in section 25, same township and range, there appears to have been an erasure of nearly one whole line across the page and a subsequent entry placed thereon under date of December 29th, 1834; it appears to be in the same handwriting and in the same ink as other contemporaneous entries made in the same section, and is the same handwriting as the original of
88 Exhibit "B," except the exceptions heretofore referred to. In section 27, same township and range, there appears to have been an erasure of nearly a whole line across the page, upon which a subsequent entry has been recorded, but it is in a different handwriting from contemporaneous entries in the same section; it bears date February 14th, 1848.

Question. Refer to same tract book, in township 65, range 6, and note what erasures you see there.

Answer. In section 5 of said township and range there appears to have been an erasure and a subsequent entry recorded over it; it appears to be in the same handwriting of contemporaneous entries in same section, and bears date May 14th, 1836.

Witness' attention called to the register of cash certificates of sales.

Question. Look at the entry of May 14th, 1836, of the west half southwest — of said section 65, range 6; also entry 14th February, 1848, southwest — of southeast quarter of section 27, township 64, range 6; also entry of date December 29, 1834, of southwest quarter of section 25, same township and range; also entry of date May 9th, 1838, of east half of southeast quarter of section 14, same township and range, and state whether there is any evidence whatever, as shown by said register of cash entries, of the erasures referred to in your last answer. And is not the handwriting of said register the same as on the tract book where said original erasures appear?

Answer. There appears to be no erasures in the registers of certificates, with reference to said tracts, and they appear to correspond with the entries as they now appear upon the tract book, and the handwriting also appears to be the same.

Defendant objects to all evidence in relation to all erasures of the records not in section 36, township 64, range 6, as not being
89 relevant to the issues in this case.

Question. State, from your knowledge of the records of this office

and the practice therein, how these alterations and corrections on the tract and plat books occur so frequently.

Answer. Those to which my attention has been called would appear to have been corrected on the tract book to conform to the other records containing the same entries; they sometimes occur on comparison by the register and receiver of their returns with the original records of entries and the purchaser's application.

Question. Was it not customary in this office to make warrant and scrip and homestead entries in red ink?

Answer. Such has been the recent custom.

Question. Has not it been the custom since the issue of college scrip?

Answer. Yes; I should say it had.

Defendant here shows witness a paper, marked Exhibit "G."

Question. I would ask you to examine the register of cash certificates, of which Exhibit "F" is a copy, and state whether or not it does not conform in every respect as to the entry number, 14513, of Edward Jenner Smith, with the receiver's original entry of monthly returns, of which Exhibit "G" is a copy.

Answer. I should say that it did.

Witness shown paper, which is introduced in evidence and marked Exhibit "H."

Question. What is Exhibit "H?"

Answer. It is a certified copy of receiver's monthly returns.

Question. Is it not customary for officers of land offices to fill out applications of parties?

Answer. It is very frequently the case.

—. Is not the application signed by the applicant the basis of every subsequent act of both register and receiver, in posting
90 up their record?

Answer. I should say that it was.

Question. What is the first paper as evidence of payment given to an applicant for land?

Answer. A duplicate receipt issued by the receiver.

—. If that duplicate receipt conforms with purchaser's application has he any remedy, except by complying with law and regulations of the office, to claim other land than therein set forth?

Answer. He has not.

—. In making monthly returns of sales of lands to General Land Office are not registers and receivers required to carefully compare the original application with their several records at the end of each month?

Answer. I should say that such is the requirement of the Department.

Question. At the end of each month, when returns are made, any discrepancies which may have occurred in the records are made to conform with the original purchaser's application, are they not?

Answer. Such has been the practice of this office.

Question. Even where it should appear that the same land had

been applied for and sold to different parties, would not the register and receiver at the end of the month be necessarily compelled to make their records conform to the original application and post their records accordingly if any inaccuracies had occurred therein?

Answer. I know of no rule or regulation of the office requiring the register and receiver to report an entry which they know to be erroneous.

Question. Is it not probable that the register posted entry No. 14513 of Edward Jenner Smith, as referred to in Exhibit "C," upon the register of certificates, as shown in Exhibit "F," as his first act?

91 Answer. It is possible that he might have done so in a single instance, but it is not customary where a number of applications are made at the same time; judging from the extensive business done at the Palmyra office at that time, it is probable that the applications were first recorded in the tract book.

Question. From your knowledge of the duties of the register, where an applicant files an application for land, is it customary for the register to number said application and post up his records before he certifies such application to the receiver that the land therein applied for contains a correct area and the price agreed upon per acre?

Answer. From my experience as a receiver, such was the custom.

Question. Were that the practice the register's records would be posted prior to applicant's paying his money for the land, would it not?

Answer. I should say that it would where the business was limited to a few entries per day.

Question. What are the receiver's duties?

Answer. He issues a duplicate receipt to the applicant describing the land sold, price per acre, and the aggregate value of the same.

Question. A person applying for land over his own signature and immediately thereafter obtaining a receipt from the receiver has every opportunity to guard against any error that may have occurred either in his application or his duplicate receipt, has he not?

A. I should say that he had.

Question. Where the application and duplicate receipt is given applicant at the time of purchase is it not fair to presume that the register and receiver intended to sell and the applicant intended to purchase the land set forth in said papers?

Answer. If they intended to act fairly and honorably I should say that it was.

92 Question. Is there any evidence whatever in this office that Edward Jenner Smith did enter or that the register and receiver did sell the said southeast quarter as shown on Exhibit "B?"

Answer. I should say that there is not any existing positive evidence.

Question. The records of this office show that Edward Jenner Smith was quite a large dealer in lands, does it not?

Answer. From my observation of the records I should say that he was a quite extensive purchaser.

Question. Are you acquainted with the mode of making township plats furnished the various counties of the State by the local U. S. offices?

Answer. I have a limited knowledge of the manner in which they are made.

Question. In the making of said plats do you not know from your own knowledge that inaccuracies have occurred from the fact that they are not a correct report of lands that may have been applied for and sold?

Answer. I don't know of my personal knowledge of any errors which may have been committed in that way.

Question. Errors embraced in the original tract book would necessarily be made on such plats, would they not?

Answer. In some respects I should say that they would.

Question. By comparison with records of the register and receiver's offices and original applications such township plats made in such manner would show a correct disposition of the land, would it not?

Answer. I should say that they would.

Question. Made in any other manner are they not liable to many errors and mistakes?

93 Answer. I should say that errors might creep in if made in any other manner; such plats are not customarily compared with the applications, it being supposed that the applications have been previously compared with the plat and tract book.

Question. These township plats, as a general thing, are paid for at so much per entry, are they not?

Answer. That has been the practice; the work is estimated by the entries to be made.

Question. The more entries, then, contained on a township plat compiled in this way the more pay there would be, would there not?

Answer. That would follow as a matter of course.

Question. All these matters about which you have been testifying relate to the sale of land under the cash system and the rules and regulations of the General Land Office thereunder, and has not the practice of the various land offices embraced in this land office as shown by the record been regular and uniform?

Answer. I should say that they were.

On his re-examination witness testified:

I have been cross-examined by the plaintiff in person. During his examination he has refreshed my recollection with regard to the persons who have been engaged in the purchase of lands at this office. He has also called my attention to the erasures to which I have testified. He has, in conducting the examination, evinced a very great familiarity with the business and records of this land office. A number of entries have been made by plaintiff in the name of Catharine M. Boardman, the wife of George W. Boardman and the sister of plaintiff. None of the entries to which he called my attention on the tract book and plat book now show a double entry except

in the section 36 in controversy. Upon the examination of township plat of town 64, range 6, there is but one tract upon which
94 there is distinctly visible a double entry, that being the southwest quarter of section 36 of said township and range. I perceive no double numbers upon any other tract in said township except the southwest quarter referred to. I fail to perceive any erasures upon the tract book and plat book of the same tract embraced in those entries to which my attention has been called except the said southwest quarter of section 36. I should say that the substituted letter " W " in the entry of Edward Jenner Smith in section 36, township 64, range 6, was made subsequent to date of entry for the reason that other correction- made at the time these entries were made were much better executed and conformed more strictly to the handwriting of the register at that time. I should say that the substituted letter " W " was not in the handwriting of the register who made the entry.

Ques. Suppose the original entry on the tract book showed that Edward Jenner Smith ente ed the southeast quarter of said section 36, and that the number on the original plat corresponded with such entry in the tract book, and suppose that after years had elapsed another register and receiver had come into office, and suppose that they or either of them had ascertained or had their attention called by another; that the original application of said Smith called for the southwest quarter instead of the southeast quarter of said section, and suppose that only two lines above the original entry on the tract book and from the original plat — that the said southwest quarter had been previously entered by Robert Wooden. State whether or not the receiver or register, or one or both of them, would have had the right to have changed the said entry on the tract book by erasing the letter E in said southeast quarter and substituting the letter " W " instead thereof, and to have changed the original plat book by erasing from the southeast quarter the number of the certificate of the entry, 14513, and placing the said number, 14513, on the southwest quarter of said plat, where the number of Wooden's certificate, namely, 7417, had been previously placed.

95 Plaintiff objects to the foregoing question as incompetent, hypothetical, and contrary to the rules of evidence.

Ans. I should say that upon the discovery by the register and receiver of a conflict between the tract and plat book and the original application they would not necessarily be compelled to correct the records to agree with the application, unless so instructed by the Commissioner of the General Land Office, and, if so instructed, the proper notations should have been made upon the tract book referring to such authority by date. The custom of the office would not require them to voluntarily make the change.

Question. If the register and receiver found the tract and plat books in conflict with the original application and other records of the office as indicated in the preceding question, and if it appeared to them that the double application of the S. W. qr. was evidently the result of a mistake and that Edward Jenner Smith must have

intended to purchase the S. E. qr., and that the officers of the land office intended to sell the S. E. qr., what right would the register or receiver — to change the tract and plat book to what it now appears to be and to put the said S. E. qr. on the market for sale and permit it to be entered by the plaintiff?

Objected to by plaintiff for the reason that it is incompetent and improper.

Answer. I should say that they would have no right whatever either to make the change voluntarily or to offer it for sale without complying with instructions from the General Land Office relating to lands kept out of market by erroneous marking of the books or records.

Question. What is the mode of procedure with reference to lands kept out of market by erroneous marking of the records?

Answer. It has been the custom to report them to the General Land Office; upon which report authority is given by the Commissioner to restore them to market by publication, and generally when the land is applied to be restored to market by an individual it is usual to publish the notice in the paper having the largest circulation in the county where the land lies.

96 Question. When the land is restored to market can it be entered by agricultural college scrip, particularly when the land had been supposed to have been disposed of at cash sale?

Answer. I cannot say positively.

Question. What books are examined by the public generally to ascertain what lands has been entered and what lands are for sale?

Answer. The tract and plat books.

97 Witness resumes narrative form of deposing:

There appears to have been sold, for cash, at the Palmyra land office during the month of July, 1836, 74,700 acres, for which there was received $39,376, and the number of entries made during that month was 568, 32 of which applications were made on the 6th day of said month. I can't say how the register came to write the S. W. ¼ on the application and S. E. ¼ on the tract book, but such evidently was the case, and I believe from experience that the error was allowed to remain through a failure on the part of the register and receiver to properly compare their returns with the original records of entries; they should have compared their returns with the original tract and plat book, such being the instructions of the Land Department. I believe that the plaintiff is perfectly familiar with all the laws, rules, and regulations of general and local land offices.

On his recross-ex'n witness said:

Question. Are the register and receiver particularly enjoined in their instructions from the General Land Office to carefully compare each and both of their records, the certificates of purchase, and original receipt with purchaser's application when making their monthly returns at the close of each month?

Answer. I understand such to be the instructions of the General Land Office.

Question. From your knowledge of the records of this office are you not confident if an examination were made by you of the records that you could find many instances where double entries have been made and that there has really been more land sold in many sections than the sections contained?

Answer. I have observed many such cases.

Question. From your acquaintance with the business of the land office, especially when there is a good deal of business transacted, has not the register failed to regularly mark up his records?

98

Answer. I have observed a failure of one register to properly post the entries made upon his records.

Question. If, at the expiration of the month of July, 1836, the receiver's receipts, the original receipt, the purchaser's application, register of certificates, and certificate of purchase all conformed one with the other and differed with the tract and plat book, would not the said tract and plat book be made to conform therewith?

Answer. Yes; I should say that they would, providing there was no conflict with existing prior valid entries.

On his redirect witness said:

I am aware of the fact that the monthly returns of the register and receiver have been frequently forwarded to Washington without being compared with the tract and plat books. If, at the end of the month of July, 1836, the register and receiver found upon comparison that their several records were in conflict with the tract and plat books in relation to the entry of Edward Jenner Smith and Robert Wooden as it now appears of record, they should not have reported the entry of Edward Jenner Smith without noting upon their returns the fact of such conflict. It is expected, when the business is great, that the entries shall be posted on the tract and plat book first, to the exclusion of other records, if the time be limited.

JOHN N. GOTT.

Sworn to and subscribed before me on the day, at the place, and within the hours last aforesaid, to wit, the 27th day of January, 1877.

D. A. McMILLAN,
Notary Public.

Plaintiff objected to the following part of said deposition in the following words, to wit:

99

"Question. What did you hear Mr. Boardman say as to his connection with the General Land Office at Wash., D. C.?

"Answer. I heard him say he hard charge of a division of the General Land Office before he was appointed register at Boonville, Mo. During my connection with the Boonville land office, as receiver, plaintiff entered quite a number of tracts. He entered some tracts

which proved to be in conflict with prior entries or claims. These conflicts were not confined to entries made by plaintiff, but happened with other entries made by other parties. These conflicts happened more frequently with plaintiff, for the reason he made more entries." Which objection the court sustained; to which decision of the court the defendants then excepted. The plaintiff also objected to that part of Gotts' deposition commencing the words "His fortunate adventures" (see page 14, line 21, of this transcript) and ending with the words "resulted in his defeat" (see page 15, line 5, of this transcript); which objection was sustained by the court, and the action of the court in sustaining said objection then was excepted to by the defendant.

100 Ninth. Gustave Reiche's deposition, which is in words and figures as follows, to wit:

"GUSTAVE REICHE, being produced, sworn, and examined on the part of the defendants, deposes and says:

My name is Gustave Reiche; my residence, Boonville, Cooper county, Missouri, and my age is 49 years; am register of public land at the Boonville land office. I have been register since the 4th day of July, 1874. The records in this office in relation to the entries of Robert Wooden and Edward Jenner Smith, as shown by the original of Exhibit "B," are, first, the register of entries—tract book, plat book. The original papers on file in this office in relation to these entries are the original applications of purchasers. These are all the record and papers of the register. The receiver's office shows the following records pertaining to these entries: The register of receipt issued by the receiver and the quarterly account current. The entries of this office pertaining to this entry of A. C. Widdicombe, as shown on Exhibit "B," are the abstract of agricultural college scrip locations—tract book and plat book. The receiver has to account for agricultural college scrip locations in his monthly and quarterly reports. The original application of A. C. Widdicombe for the tract above referred to is not on file in this office; it is at the General Land Office at Washington, D. C. I have examined Exhibit "B" and the original thereof and find that the entries follow each other in the original in succeeding lines as shown on the exhibit, except that there are two lines between the entry of Smith and the entry of Widdicombe. All of Exhibit "B" in the original is on the same page; the cross-lines in the exhibit are ruled exactly like the original. I have examined the papers on file in this office and made search for the letter of the Commissioner of the General Land Office notifying the register of this office that plaintiff had been excluded from practising before the
101 General Land Office (as testified to by last witness) and am unable to find it. I have examined the plat book of this office in reference to the vacant lands in township 64, of range 6, and would say that from the appearance of that record there is no vacant land in said township. The last cash entry of lands in said township appears to have been made July 31, 1848, except the entry of A. C.

Widdicombe, as shown by Exhibit "B," and the last warrant location appears to have been made in October, 1848. I have examined the original plat book, showing the entry of section 36, township 64, range 6, and I find an erasure on the southeast quarter of said section. I have compared Exhibit "A" with said plat, and said erasure appears between the words A. C. scrip and extending to and under the words and figures "No. 1520." The erasure is apparent to the naked eye, and was apparently made before the words "A. C. scrip" were written. I have examined the numbers 7417 in the southwest and northwest quarter and 7418 on the W. ½ N. E. and 14513 on the E. ½ N. E. and S. W. ¼, and find them all in the same handwriting, except the number 14513 on the S. W. ¼, which is in a different handwriting. The numbers on the S. W. ¼, 14513, seem to be in a fresher ink and seem to have a newer appearance than the other numbers above referred to. I have examined the tract book as the originals of Exhibit "B" and find in the Edward Jenner Smith entry the "W" describing the S. W. ½ is written on an erasure, and the "W" has a fresher and darker appearance. The "W" at first glance appears to be of a different handwriting; but writing on an erasure frequently changes the handwriting. I cannot say this of every one, but have observed it in my own experience. I have compared the said entries on the tract book, the registry of entries, the application, and plat book, and I find that the handwriting in the tract book, the register of entry, and in the body of the
102 application are the same, with the exception of the names of applicants and the "W" before mentioned. The numbers seem be of various handwriting. The numbers on the plat book, except the number 14513 on southwest and 1520 on the southeast and the numbers endorsed on the back of the original applications, are in the same handwriting. The entries referred to are the entries of Edward Jenner Smith and Robert Wooden in section 36, township 64, range 6. The handwriting of the original application, the tract book, registry of entries, and plat book, except the exceptions above referred to, are in the handwriting of William Wright, the register. The numbers endorsed on the back of the application are the "file" or register's numbers, and are in the handwriting of the said register. The current numbers on the inside of the original application of Robert Wooden, 7417, 7418, are in the same handwriting, but in a different handwriting from the register. The current number in the inside of the original application of Edward Jenner Smith, to wit, 14513, is different from all the other handwritings. I mean by the current number the number on the inside of the application and by the "file" number the number on the outside of the application. It appears from the records of Register Wright that during the period of the entries of Edward Jenner Smith and Robert Wooden all contemporaneous entries were made by himself.

On his cross-examination witness said:

I resided in Warren county, Missouri, prior to my acceptance of the office of register. My previous occupation was that of circuit

clerk and *ex officio* recorder of said county. I am, and was prior to my taking possession of this office, experienced in land titles and the records thereof. The officers of the land office are the register of lands and receiver of public monies. The duties of the two officers are quite different. The duties of the register is to have charge of the records of the sales of lands and receive the applications for lands. When the register receives an application for land he certifies the application to the receiver for him to re-
103 ceive the money. He makes no notation whatever on the record until the land is paid for; when the land is paid for, then he is authorized to make the entries on the record—that is, on the register of certificates, on the tract book, and plat book. The receiver makes the first notation on the record—that is, he gives the current number to the application; he then receives the money and issues a duplicate receipt to the purchaser and retains the original; he then appends the original receipt to the back of the original application and hands them back to the register. At the end of the month the register and receiver each makes out his monthly report and they then compare them with the applications, registry of entries, and entries on the tract book, also with the receiver's receipts and the registry of receipts, and all of these with each other, and certify that they are found to agree and are correct. If we find any inaccuracies, omissions, or clerical errors in any of said records they are corrected to conform with the original application. We are particularly instructed by the General Land Office to have the applicant sign his name distinctly and must give the description of the land plainly and definitely. These instructions and the practice of the office are in accordance with the acts of Congress and the instructions issued thereunder. From my knowledge of the record I find that all the records have been made in compliance with law, but I can't say that the officers in every instance did their duty. I know that my predecessor, Major E. G. Evans, was removed before his time was out. I understand that my predecessor did not compare his returns with the receiver for the reason that so many entries are not marked on the plats, which omissions would have been discovered had they compared their returns. John N. Gott was receiver when E. G. Evans was register, at least a portion of the time. The current number on the inside of the applications of Edward Jenner Smith and Robert Wooden, as shown in Exhibits "C," "D," and "E," are in the handwriting of the receiver, as shown
104 on his monthly and quarterly returns of that date. At the time of the entry of Edward Jenner Smith William Blakey was receiver; also at the time of the entries of Robert Wooden he was receiver. From my examination of the originals of Exhibits "C," "D," and "E" with the receiver's record of that date it appears that he complied with the regulations; this would seem to be so from the fact that he gave the application the current number, which appears to be in his handwriting. From my examination of the record in regard to the entries of Smith and Wooden it would appear that the receiver made the first record from the fact that he gave it the current number, and that was in accordance with the

rules and regulations. The regulations and rules were the same when these entries were made that they are now. The register having certified the lands referred to in Exhibits "C," "D," and "E" to the receiver, and the receiver having given his current number to the application and issued his receipts, original and duplicate, and returned the same to the register, it was his duty to make his records conform thereto. The register would go to the register of entries first to perfect the records of the sale made by the receiver and post up the entry there and record it on the tract book and then on the plat book. The entry is first made on the registry of entries in order to give it its current number. I find by referring to original tract book, township 64, range 6, that there is an erasure on the northeast — of the northwest quarter, section 24, entry number 19457; also an erasure on the southeast — southwest quarter of same section, entry No. 8495. It appears that a previous number had been written across this tract and erased or obliterated. It appears that the register, at the time of the entry, made a mistake by writing a number across the E. ½ southwest qr., and when he discovered that it was a misposting he erased it and wrote the last-named two numbers thereon. I find that on the east half 1 and 2, northwest qr. section 6, there is a double number. I also find
105 that on the southeast — southeast qr. section 8 there is an erasure of a part of the number. Erasures of this character are very numerous in all the records of this office, and is a natural consequence from the manner of conducting the business of the office. It is very unusual that an error will run through all the records of the office. The original application is the basis of all the entries, and all errors are usually detected by comparison of the returns at the end of the month. It appears that all the officers of the office have corrected their records to conform to the original applications. It is essential that the register have proof of the payment of the money for the land sold before he makes up the record of the entry. The evidence of the payment of the money is the receiver's receipt, which corresponds with the application. To follow any other course would be contrary to law, and in many instances defeat the applicant getting the land he sought to enter. An application, accompanied by the money left with the receiver, always takes precedence over an application without the money filed with the register, even although the application filed with the register was of prior date. It is possible that if the records of township 64, range 6, were carefully examined and all the papers on file carefully compared there might be a vacant tract found therein. I have found upon examination of the records of townships as closely marked up as township 64, range 6, vacant lands. If an application is made for lands which on first appearance is not vacant, but the applicant insists that the land is vacant, and I find from the first application that it was for a different tract from that actually posted, and I find the books posted incorrectly, the proper posting is made and the vacant land is sold. If land really vacant is withheld from applicant the register makes himself liable to the applicant for the sum of five dollars per acre if any subsequent applicant gets the land.

If the examination shows that there is an obvious erroneous
106 marking, that the tract applied for is really vacant, no application is made to the General Land Office to have the tract restored to market. If the land has really been disposed of and afterwards the entry cancelled, or where the records are so incomplete that we cannot arrive at the true status of the tract, then we apply for the real status of the land to the General Land Office and for authority to restore such as have been previously erroneously disposed of or cancelled. I have found land here which first appeared from the records to have been disposed of, but upon close investigation I found the tract to be vacant, and upon inquiry of the General Land Office I was advised to entertain private entry of it. In receiving authority to restore tracts to market I never receive instructions to have the land advertised in a certain county or a certain paper, but the proof of the publication has to be furnished before it is restored to market.

Paper shown witness by plaintiff, which is marked Exhibit "I."

This is a certified copy from the original abstract of agricultural college scrip locations containing location R. & R., number 871, by A. C. Widdicombe, of agricultural college scrip number 1520. The file numbers on back of application are presumed to be made by the register, and made when he files them away at the end of the month.

Witness' attention called to the original of Exhibit "A."

I would say that the number 7417 has a darker shade than the number 7418 on the west half N. E. — of section 36, township 64, range 6.

Where an application is made erroneously by the applicant the register and receiver have no authority to alter or correct it, but he may make application through the local office to the General Land Office to have his application corrected. Since I have been register of the land office there has been land entered in thickly-settled districts of the State where it was thought there was no vacant land. One I now recall was an entry of the tract near Louisiana, in this State; also one in this county, near the Moniteau county line; also a tract in St. Charles county. There has been a large
107 quantity of land sold at this office during the last ten years. The location of agricultural college scrip in the month of March, 1866, at this office amounted alone to 47,422.50 acres, and the cash entries for the same month amounted to 8,368.20 acres, and for June, 1866, the cash entries amounted to 7,490 acres, and a large majority of those entries were made by James M. Nelson, who is vice-president of the Central National Bank of Boonville, Missouri, and a large portion of these lands were on the line of the Pacific railroad.

On his re-examination witness said:

I have been examined by the plaintiff in person. He has evinced in his examination great familiarity with the record of this office and the rules and regulations of the general and local land offices.

From my acquaintance with the plaintiff I should say that he is very familiar with the records of the office. I never had any connection with the land office until I commenced my term of office in, July, 1874. What I know of the practice of the office and the rules and regulations thereof I have learned since I was appointed register. I am more familiar with the duties of register, yet I know the general duties of the receiver. The business done now, compared with the business of 1836, I would say that there is very little done now, comparatively. The register and receiver have their offices together at this land office. I don't know, of my present knowledge, who made the first notations of entries at the Palmyra office, in the years 1834 and 1836. If Edward Jenner Smith went to Palmyra to enter land in 1836 I think he would have applied to the register to ascertain what land in the particular section he wished to enter was vacant, and they would have examined the tract books and the plat book. They would see, in looking at section 36, township 64, range 6, that the S. W. qr. had been entered, if it had been posted, and it would appear from the tract book and plat book that they were posted up to the time of Smith's application. It would certainly not have been proper for the register to have received another application for the southwest qt., it having been already entered, if he had perceived it; it would have been the duty of the register to have told Mr. Smith, if he had applied for the southwest qr., that it had already been entered. If the register and receiver had compared their monthly returns with the application and other records they would have discovered that the southwest qr. had been previously applied for and sold to Wooden. Having discovered the discrepancy between the application and the other record, in regard to the entry of Edward Jenner Smith, it was the duty of the register to make the record conform with the application. If an error is discovered of this kind it would be proper to call the attention of the General Land Office to it; I would do so. The General Land Office would have cancelled the entry in conflict with the previous entry and notified this office to notify the applicant to apply for his money. If Edward Jenner Smith had intended to have entered the southeast instead of the southwest, upon being notified of the conflict and cancellation, he could have made application through this office to have his entry changed to the southeast.

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Question. Suppose that on the 6th of July, 1836, Edward Jenner Smith intended to enter, and the register and receiver intended to sell to him, the southeast quarter of section 36, and suppose that the original entries made by the register upon the tract book show that fact, and suppose that fact was further confirmed by the former entry of Robert Wooden of the southwest quarter, and suppose the register and receiver, at the end of the month of July, 1836, discovered that the register, in writing out the application of Edward Jenner Smith, had made a mistake and written the southwest quarter instead of the southeast quarter, would the register have been authorized or would his duty — compelled him to erase the numbers from the southeast quarter and place them upon the southwest quarter of the plat and to have erased the E in the southeast quarter and substi-

tute the "W," thus destroying evidence of what he knew the intention of the parties to have been. If there is any rule or regulation authorizing the mutilation or destruction of such record, evidence of what he knew the intention of the parties to have been, please state it.

109 Objected to by plaintiff as contrary to the rules of evidence.

Answer. According to my understanding of the obligations of different officers of this office, I think that the receiver and his securities could have compelled the register to conform his record to the description of the land in the application, certified to him as vacant, and for which he had issued his receipt, which had gone out of the office, and for which the receiver and his sureties were personally responsible. By this way he would have protected the receiver, complied with the regulations, and put the purchaser in a condition where he could correct his error, if he had made any.

Witness resumes narrative form of deposing:

When I speak of the rule with regard to the restoration of land to market which have been withheld on account of erroneous entries or marking, I speak from recollection and from practice. The rule is a written rule. The number written over the erasures, to which plaintiff has called my attention, are in the handwriting of William Wright, the register, except the one in section 6.

On his recross-examination witness said:

Question. If, on the 6th day of July, 1836, Edward Jenner Smith had applied to enter the S. W. qr. of section 36, and the register certified the fact to the receiver, and the receiver had issued the usual original and duplicate receipts and handed back purchaser's application and original receipt to the register, and that he thereupon posted up his register of certificates in conformity to the said original duplicate and receipt and improperly noted on the tract book and plat book the sale of the southeast qr. instead of the southwest qr., and, on the 7th of July, a stranger should present to the register an application for the southeast qr. of section 36, would not the register be necessarily compelled to certify the fact to the receiver that the said S. E. qr. was vacant, and, upon said stranger's application, with original receipt, being returned to him from the receiver, would he not be compelled to correct his erroneous entry of Edward Jenner Smith on the tract and plat book, even though the register
110 knew it was the intention of Smith to have applied for the said S. E. qr.?

Answer. It would bring me or any register in a position to correct the tract and plat book and post the application of the last applicant on the books.

Question. The state of facts existing as referred to in the last question, would the register be authorized to refuse the second application, and, if he did, would he not be amenable under the law?

Answer. He would have no right to refuse the second application,

and, if he did, he would be liable in damages to the party aggrieved if a subsequent application should get the land.

Question. Refer to Exhibits "A" and "B"—that is, to the original of those exhibits, and state if there appears to be an erasure, substitution, or distinction, as shown from the original records and files in this office, of any legal, valid, or subsisting entry or application.

Answer. According to the original application of Edward Jenner Smith no marking on the S. E. qr., where the A. C. scrip appears, was of any value on this tract, and on Exhibit "B," in the entry of Edward Jenner Smith, any indication pointing to the S. E. qr. would have been wrong, because not in conformity with the registry of entries and the application.

Question. Then has there been any destruction of any original entry, as shown by Exhibits "A" and "B?"

Answer. There has not of any valid entry.

Question. Would not the register at that time or any subsequent register having charge of the originals of Exhibits "A" and "B" — been justified in making the proper correction on said originals in any manner deemed proper by them?

Answer. He would have been justified in erasing it or crossing it out and writing error thereon.

Question. From your experience in this office did not some
111 registers adopt one mode and some another?

Answer. They did.

Question. From your knowledge of the records, is it not frequently shown that double entries have been made in the same section and the same lands sold twice?

Answer. Yes; they are frequent.

Question. The register and receiver often act in a judicial capacity and are considered judicial officers, are they not?

Answer. Yes; they are.

Question. Is it not necessary and frequently essential for parties having business before this office to employ lawyers to transact their business?

Answer. In some cases it is just as necessary as to employ lawyers in court.

On his redirect examination witness said:

Certified copy of monthly and quarterly abstracts of receivers hereto attached and marked Exhibits "J," "K."

GUSTAVE REICHE.

Subscribed and sworn to before me this 30th of January, 1877, at the place and within the hours first aforesaid.

D. A. McMILLAN,
Notary Pub.

Tenth. Deposition of THOMAS S. DUNNICA, which is in words and figures as follows, to wit:

Thomas S. Dunnica, of lawful age, being produced, sworn, and examined, upon oath deposeth and says, on the part of the defendant:

My name is Thomas S. Dunnica; my age is 28 years, and my residence is Boonville, Cooper county, Missouri, and my occupation is cashier of the banking house of Aehle, Dunnica and Co.,
112 Boonville, Mo. I regard myself as an expert in regard to handwriting. I have examined the original of Exhibit "A," and find that there has been an erasure on the southeast quarter. It is apparent to the naked eye. The erasure is between the A. C. scrip and the number 1520; it appears to be in the center of the southeast quarter. I have examined the number 14513 on the southwest quarter and compared it with the numbers 7417, 7418, and the other 14513 in the east half of the northeast quarter, and I find it, in my opinion, to be of a fresher appearance, and it appears to have been written at a later date, and it is in a different handwriting, as is apparent to my eye. I can't tell what has been erased from southeast quarter of said section. I have compared the figures 14513 on the southwest quarter with the number 1520 on the southeast quarter. I don't think they are in the same handwriting, but I am not as positive with regard to these figures as the others, as the number 1520 is written over an erasure and the ink has spread somewhat. I have compared the figures 7417, 7418, and 14513 in the east half northeast — of section 36, and they are in the same handwriting. I have examined the original of Exhibit "B," and I find an erasure underneath the letter W in the southwest quarter of the entry of Edward Jenner Smith. I cannot say what was erased. The letter W appears to be in a different ink and has a fresher and a newer appearance than the rest of the entry and appears to be in a different handwriting. I should say that all of the original of Exhibit "B," except the substituted letter "W" and the entry of A. C. Widdicombe, appear to be in the same handwriting.

On his cross-examination witness said:

I have examined the original of Exhibit "A" and compared the number 7417 with the numbers 14513 and 7418, on the E. ½ N. E. qr., and I should say that the figures 7417 are darker and have a fresher appearance than the figures 14513 and 7418. I have examined the substituted letter "W" on the original of Exhibit "B," and I find that the letter "W" is made in a different way from the others in said original. I have been acquainted with plaintiff since 1869 or 1870. I know of plaintiff going on the official bond of Sh'ff Newman in 1872. Newman was sheriff of this county.

On his redirect examination witness said:

113 The figures 7417, 7418, and 14513, in the east half northeast quarter of the original of Exhibit "A" show great age, but the figures 14513, in the southwest quarter, do not show great age.

In the original of Exhibit "B," relating to the entries of Smith and Wooden, the handwriting shows great age, except the substituted letter "W," which does not show great age. In said entry of Edward Jenner Smith the erasure and substitution of letter "W" is apparent to my naked eye. The "W" appears much fresher than the rest of the entry and has been written since the rest of the entry.

The difference I notice between the figures 7417 and 7418 and 14513 in the E. ½ N. E. qr. may be the result of a different ink or a heavier stroke of the pen. They are in the same handwriting.

T. S. DUNNICA.

Sworn to and subscribed before me on the 30th day of January, 1877, at the place and within the hour first aforesaid.

D. A. McMILLAN,
Notary Public.

Eleventh. Deposition of WILL L. STEPHENS, which is in words and figures as follows, to wit:

Will L. Stephens, of lawful age, being produced, sworn, and examined on the part of the defendant, deposes and says:

My name is Will L. Stephens; my age, 27 years; my residence, Boonville, Cooper county, Missouri, and my occupation is cashier of the Central National Bank of Boonville, Mo. I have examined the original of Exhibit "A," and I find that there has been an erasure in the southeast quarter. The erasure is between the figures 1520 and the words "A. C. scrip," and extends under the number somewhat. It has the appearance of having been erased before the words A. C. scrip, and the number 1520 was written. I have examined the number 14513, on the southwest quarter, and compared them with the numbers 7417, 7418, and the other 14513 in the E. ½ N. E. qr., and the 14513 on the S. W. qr. seems to be in a different handwriting from the others, but it might have been written by the same party at a different time. I don't see any sim-
114 ilarity between them, and it is my opinion, if they were made at the same time, they are in a different handwriting. The figures 7417, 7417, 7418, and 14513, on the E. ½ N. E. — appear to be in the same handwriting. The figures 14513, on the S. W. qr., appear to be in a darker ink and does not appear to have the age of the other figures. I have examined the original of Exhibit "B." I find an erasure underneath the "W," in the S. W. qr., in the entry of Edward Jenner Smith. There seems to have been the erasure of a letter and the substitution of the letter "W" over it. The erasure and substitution of the letter W is apparent to the naked eye. The substituted letter "W" seems to have a darker and fresher appearance. All of the writing relating to the entries of Wooden and Smith appear to be in the same hand, except the substituted letter W, which seems to be in a different handwriting; all of the writing relating to the entries of Wooden and Smith seem to show greater age than the substituted letter "W;" the substituted letter W seems to be several years old.

On his cross-examination witness said:

I have examined the original of Exhibit A and compared the numbers 7417, 7417, 7418, and the numbers, 14513, on the E. ½ N. E. qr., and I should say that the numbers 7417, 7417, do not appear to have the same age as the figures 7418 and 14513 on the E. ½ N. E. —. It may have the age, but a heavier stroke; they were written by the same person.

On his redirect ex. witness said:

The difference in the appearance in the age may have been occasioned by a heavier stroke of the pen or a darker ink in writing the 7417. All of these figures last above referred to have the appearance of great age and a greater age than the figures 14513 in the S. W. qr.

WILL L. STEPHENS.

Subscribed and sworn to before me on the 30th day of January, 1877, at the place and within the hours first aforesaid.

D. A. McMILLAN,
Notary Public.

115 All which depositions aforesaid are accompanied with the certificate of D. A. McMillan, notary public, in words and figures following, to wit:

I, D. A. McMillan, notary public within and for the county of Cooper, State of Missouri, duly qualified on the 23rd day of March, 1874, and my term of office expiring on the 3rd day of March, 1878, do certify that in pursuance of the annexed notice came before me, at the office of register of lands of the United States, in the city of Boonville, in the county of Cooper, in the State of Missouri, John N. Gott, Gustave Reiche, Thos. S. Dunnica, Will L. Stephens, J. F. Adams, J. E. Taliafirio, R. W. Wilom, and F. W. Ludwig, who were by me severally sworn to testify the whole truth of their knowledge touching the matter in controversy aforesaid; that they were examined and their examination reduced to writing and subscribed by them, respectively, in my presence on the day, between the hours, at the place in that behalf aforesaid, and their said depositions are now herewith returned; and I further certify that said John Gott, Gustave Reiche, Thomas S. Dunnica, Will L. Stephens, J. F. Adams, J. E. Taliaferro, R. W. Whillom, and F. W. Ludwig are residents of the county of Cooper, in the State of Missouri.

Given under my hand and official seal, at the office of the register of lands of the United States, in the city of Boonville, county of Cooper, State of Missouri, this 30th day of January, A. D. 1877.

[SEAL.] D. A. McMILLAN,
Notary Public.

And said depositions are endorsed on back as follows:

Received, sealed, opened, and filed by me on this 3rd day of February, A. D. 1877.

JOS. H. DONLEY, *Clerk.*

116 Twelfth. Defendant introduces his chain of title—a deed of Edward Jenner Smith to John D. Smith, dated 6th November, 1837, conveying, among other lands, S. E. qr. section 36, T. 64, R. 6 W., with covenants of general warrantee.

13. Will of John D. Smith, which is in words and figures as follows, to wit:

"*Ne varietur.*"
October 27th, 1838.

G. W. KEATON, *P. Judge.*

In the name of God, amen: I, John D. Smith, of the parish of Concordia and State of Louisiana, do make and ordain this my last will and testament in manner and form following, to wit: *Imprimis*, I will that all this estate on which I live should be retained and kept together under the direction of the executors hereinafter named until all debts due and legacies hereinafter mentioned be paid; second, I will that all this estate in this parish and all moneys due to it at the time of my death be divided into seven shares: To Edward Jenner Smith I give two shares; to Walton P. Smith I give three shares; to Van P. Winder I give one share; to Caroline W. Guion I give one share, and would recommend that the negroes and personal property should be parcelled out into the seven parcels and divided by lot; that the land be sold on such terms as may seem advisable to the executors and the proceeds divided as above directed; thirdly, I will that five thousand dollars be paid to the following persons, daughters of James Haslett and Judith Rease, to wit: To Martha, one thousand dollars; Jane, two thousand dollars; Eliza, one thousand dollars——

"*Ne varietur.*"
October 27th, 1838.

G. W. KEATON, *P. Judge.*

and Delia one thousand dollars, within two years of the day of my death; and that Walton P. Smith and George S. Guion be my executors to carry into effect this my will; fourthly, I will that one-half of my Wyaconda tract of land be given to my nephew, Jos. D. Smith,
but that he had no authority to sell, convey, or dispose of
117 the same until the expiration of the term of ten years from the date of this my will; fifthly, I will that all my estate, both real and personal, situate in the State of Missouri (always excepting any of the negroes that may have belonged to the estate in Louisiana), be equally divided between Flora C. Byme, Mary Conway Buck, and James Haslett, of Chester Co., Pa., in such way as my executors hereinafter named may direct; and finally that all my debts that have accrued or may happen in the State of Missouri be paid out of the joint funds thereof given to the three last-mentioned legatees; and moreover it is my will that——

Ne varietur.
October 27th, 1838.

G. W. KEATON, *P. Judge.*

my brother, James Smith, and James Haslett, of Chester Co., Pa., be my executors to carry into effect the provisions of this part of my will.

In witness whereof I have hereunto set my hand and affixed my seal the day and year hereunto annexed.

December 8th, 1837.

JNO. D. SMITH.

"*Ne varietur.*"
October 27th, 1838.

G. W. KEATON, *P. Judge.*

STATE OF LOUISIANA, *Parish of Concordia:*

Be it remembered that on this 29th day of October, A. D. eighteen hundred and thirty-eight, before me, George W. Keaton, judge of the said parish, personally came and appeared William L. Poindexter and Austin Williams, of this parish, and, being duly sworn, they severally declare and say that they are acquainted with the handwriting of Dr. John D. Smith, late of the parish aforesaid, deceased; that they have frequently seen him write and sign his name, and that they recognize the above paper, purporting to be an autographic will of the said deceased, to have been wholly written, dated, and signed in the proper handwriting of the said John D. Smith, deceased.

AUSTIN WILLIAMS.
WM. L. POINDEXTER.

118 Sworn to and subscribed this day and year above written.
G. W. KEATON, *P. Judge.*

STATE OF LOUISIANA, *Parish of Concordia:*

Court of Probate. October 29th, 1838.

At an audience and examination this day of the foregoing will of John D. Smith, and after hearing the evidence of Wm. L. Poindexter and Austin Williams as above given, it is ordered, adjudged, and decreed that the same be admitted to record and executed according to its provisions; and it is further ordered that Walton P. Smith and George S. Guion be confirmed in their quality of testamentary executors of the said deceased.

G. W. KEATON, *P. Judge.*

Filed for record and recorded 29th Oct., 1838.
G. W. KEATON, *P. Judge.*

STATE OF LOUISIANA, *Parish of Concordia:*

I, George W. Keaton, parish judge and *ex officio* judge and recorder of probates, wills, &c., in and for said parish, do hereby certify that the foregoing and within is a true and correct copy of the original autographic last will and testament of the late Dr. John D. Smith, deceased, as therein mentioned and expressed on file and of record in my office.

In testimony whereof I have hereunto signed my name and affixed my official seal of my office, at Vidalia, in the parish of Concordia, State of Louisiana, this eighteenth day of January, A. D. eighteen hundred and thirty-nine.

[L. S.] G. W. KEATON,
Parish Judge.

UNITED STATES OF AMERICA, *State of Louisiana:*

By Edward D. White, Governor of the State of Louisiana:

These are to certify that G. W. Keaton, whose name is subscribed to the instrument of writing herein annexed, is now and was at the time of signing the same parish judge and *ex officio* 119 judge and recorder of the probates, wills, &c., in and for the parish of Concordia; that his signature is genuine, and that all his official acts, as such, are entitled to full faith and credit.

Given at New Orleans under my hand and the seal of the State this twenty-third day of January, one thousand eight hundred and thirty-nine, and of the Independence of the United States the sixty-third.

[L. S.] E. D. WHITE.

By the Governor:
ALFRED E. FONTALL,
Secretary of State.

Rec'd and filed for record 11th day of May, 1839.
WILLIS CURD, *Recorder.*

STATE OF MISSOURI, *County of Clarke:*

I, Thomas E. Palmer, recorder of deeds in and for said county, hereby certify that the above is a true copy of the original will, with annexed certificates, in Book A, at page 625, as the same appears of record in my office.

Witness my hand as recorder and the seal of my office.

Done at office, in Cahoka, this 21st day of July, 1876.

[L. S.] THOMAS E. PALMER, *Recorder.*

Will objected and excepted — by plaintiff as irrelevant and incomplete; objection overruled.

14. Deed of James Smith and James Haslett, ex'rs of John D. Smith, to Mary C. Buck, which is in words and figures as follows, to wit:

We, the subscribers, executors of the last will and testament of John D. Smith, late of Concordia county, in the State of Louisiana, deceased, having taken into consideration so much of said deceased will as relates to the division of his real estate situate in the State of Missouri, do adjudge and set apart the following lots and parcels of ground to be given to Flora C. Byme, viz:

S. W. qr. of section 29, T. 64 *with*, R. 6 west, of the fifth principal meridian ---------- 160
South half of section 28, T. 64 *with*, range 6 west, of the fifth principal meridian ---------- 320
West half of S. W. qr. of sec. 27, T. 64 *with*, range 6 west, of the fifth principal meridian ---------- 80

560

120 South half of section 24, T. 64 *with*, range 6 west, of the fifth principal meridian ---------- 320
S. W. qr. of section 13, T. 64 *with*, range 6 west, of the fifth principal meridian ---------- 160
North fr. half of sec. 19, town. 64 N., range 5 west, of the fifth principal meridian ---------- 200
Section 18, township 64 N., range 5 west, of the fifth principal meridian ---------- 640
Fractional section 17, township 64 N., range 5 west, of the fifth principal meridian ---------- 400

Supposed to be in all about—acres ---------- 2,280

Together with any lots or parcels of land belonging to the deceased estate that may be found situate north or east of the tracts of land above described; and we do further adjudge and set apart the following lots and parcels of ground to be given to Mary Conway Buck, viz:

N. qr. of section 33, township 64 north, range 6 west, of the fifth principal meridian ---------- 160
West half of the N. E. qr. of section 33, township 64 north, range 6 west, of the fifth principal meridian ---------- 80
East half of S. E. qr. of section 30, township 64 north, range 6 west, of the fifth principal meridian ---------- 80
S. W. qr. of section 29, township 64 north, range 6 west, of the fifth principal meridian ---------- 160

480

Section 35, township 64 north, range 6 west, of the fifth principal meridian ---------- 640
S. E. qr. of section 36, township 64 north, range 6 west, of the fifth principal meridian ---------- 160
East half of N. E. qr. of section 36, township 64 north, range 6 west, of the fifth principal meridian ---------- 80
Fractional section 36, township 64 N., range 5 west, of the fifth principal meridian ---------- 500
Fractional section 36, township 64 N., range 5 west, of the fifth principal meridian ---------- 160
N. E. half of N. E. — sect. No. 1, township 63 N., range 6 west, of the fifth principal meridian ---------- 80
N. W. qr. of section 12, township 63 N., range 6 west, of the fifth principal meridian ---------- 160

Supposed to be in all about—acres ---------- 2,260

Together with all lots or parcels of land belonging to estate of John D. Smith that may be found lying or situate south of the tracts of land as herein set apart, to be given to her in conformity to his last will and testament; and, finally, we do further adjudge and set apart the following lots and parcels of ground to be given to James Haslett, of Chester county, in the State of Pennsylvania, viz:

121	N. half of section 32, township 64 north, range 6 west, of the fifth principal meridian	320
	N. E. half of N. E. qr. section 33, township 64, range 6 west, of the fifth principal meridian	80
	N. W. qr. of section 34, township 64 north, range 6 west, of the fifth principal meridian	160
	Acres	560
	S. W. qr. of southeast half of S. E. qr. section 27, township 64 north, range 6 west, of the fifth principal meridian	40
	West half of section 26, township 64 north, range 6 west, of the fifth principal meridian	320
	N. E. qr. of section 26, township 64 north, range 6 west, of the fifth principal meridian	160
	West half of S. E. qr. sec. 26, township 64 north, range 6 west, of the fifth principal meridian	80
	West half of S. W. qr. sec. 24, township 64 north, range 6 west, of the fifth principal meridian	80
	East half of S. E. qr. sec. 24, township 64 north, range 6 west, of the fifth principal meridian	80
	South fr. half of section 19, township 64 N., range 5 west, of the fifth principal meridian	200
	Fractional section 30, township 64 N., range 5 west, of the fifth principal meridian	300
	East half of N. E. qr. sec. 25, township 64 N., range 5 west, of the fifth principal meridian	80
	East half of S. E. qr. sec. 25, township 64 N., range 5 west, of the fifth principal meridian	80
	Supposed to be in all about—acres	1,980
	Also south half of section 23	320
	In all	2,300

It being understood there is yet remaining one small tract or parcel of land, situate on the river Mississippi, known as Gregory Landing, which is yet to be divided equally between the aforesaid Flora C. Byme, May Conway Buck, and James Haslett in such a way as we may hereafter direct and think just and proper.

Given under our hands, in Clarke county, State of Missouri, this 10th day of May, 1839.

JAMES SMITH.
JAMES HASLETT.

STATE OF MISSOURI, } *sct:*
County of Clarke, }

Be it remembered that at a county court begun and held in and for the county and State aforesaid on Saturday, the 11th day of May, A. D. 1839, personally appeared in open court James Smith
122 and James Haslett, executors of the last will and testament of John D. Smith, deceased, personally known to the judges of said court to be the same persons whose names are subscribed to the annexed and foregoing instrument of writing as having executed the same, and severally acknowledged the same to be their act and deed for the purposes therein mentioned, and which is ordered to be certified.

In testimony whereof I, Willis Curd, clerk of said county court, have hereunto set my hand and affixed my private seal (no seal of office provided).

Done at office, in the county and State aforesaid, the day and date above written.

[L. S.] WILLIS CURD, *Clerk.*

STATE OF MISSOURI, } *sct:*
County of Clarke, }

I, Willis Curd, clerk of the county court in and for said county of Clarke, do certify that the foregoing instrument of writing, together with the above-annexed certificate, were received by — for record May 11th, 1839, and that they are duly recorded in my office in Book of Settlements A and at pages 53, 54, and 55.

Given under my hand and private seal—no seal of office provided.

Done at office, at Waterloo, in said county of Clarke and State aforesaid, May 17th, 1839.

[SEAL.] WILLIS CURD, *Clerk.*

Received and filed for record June 8th, 1839.

STATE OF MISSOURI, *County of Clarke:*

I, Thomas E. Palmer, recorder of deeds in and for said county, hereby certify that the above is a true copy of the original instrument of writing and certificates as the same appears on record in my office in Book A, at page 587.

Witness my hand as recorder and the seal of my office.

Done at office, in Cahoka, this 21st day of July, 1876.

[L. S.] THOS. E. PALMER, *Recorder.*

Objected to, and objection overruled by the court, and ex-
123 cepted to at the time by plaintiff as incompetent and irrelevant.

15. Deed of Mary C. Buck to Theodore Jungher, wieh covenants of warranty, Sept. 18, 1850.

Objected to, and objection overruled, and excepted to at the time by plaintiff as incompetent and immaterial.

16. Power of attorney from Lucretia A. Jungher, Sallie F. Johnston and her husband, to B. F. Hagerman, which in words and figures as follows, to wit:

Know all men by these presents that we, Lucretia A. Jungher, Henry Will Johnston, and Sallie F. Johnston, of the city of Jackson and State of Mississippi, do hereby make, constitute, and appoint Benjamin F. Hagerman, of the city of Keokuk, Iowa, our true and lawful attorney to grant, bargain, sell, and convey in fee-simple, by deed or deeds, with covenants of general warranty, all our real estate situated in the county of Clarke and State of Missouri, the said land acquired by — as the only legal heirs of Theodore Jungher, deceased, hereby ratifying and confirming all acts executed by our said attorney and confirming the same as if we were personally present and did the same.

In witness whereof we set our hands and seals this 15th day of April, 1870.

L. A. JUNGHER. [SEAL.]
SALLIE F. JOHNSTON. [SEAL.]
H. WILL JOHNSTON. [SEAL.]

[U. S. int. rev. stamp, value $1, attached and cancelled.]

STATE OF MISSISSIPPI, } ss:
County of Hinds, }

Be it remembered that H. Will Johnson and Sallie F. Johnson, his wife, and Lucretia A. Jungher, who are personally known to the undersigned, a commissioner for the State of Missouri (duly appointed and commissioned by the Governor thereof for the State of Mississippi), to be the persons whose names are subscribed to the foregoing power of attorney as parties thereto, this day personally appeared before me and acknowledged that they executed and
124 delivered the same as their voluntary act and deed for the uses and purposes therein contained; and the said Sallie F. Johnson, being by me made acquainted with the contents of said power of attorney, acknowledged, on an examination apart from her said husband, that she executed the same freely and without compulsion or undue influence of her said husband.

In testimony whereof I have hereunto set my hand and seal of office this 15th day of April, A. D. 1870.

[L. S.] GEO. A. SMYTHE,
Commissioner of Deeds, &c., for the State of Missouri.

STATE OF MISSOURI, *County of Clarke:*

IN THE RECORDER'S OFFICE.

I, Thomas E. Palmer, recorder of deeds within and for the county aforesaid, do certify that the instrument of writing hereto attached, with the acknowledgments thereon, was filed for record in said office on the 30th day of January, 1875, at 2 o'clock and — minutes p. m., and that the same is duly recorded in said office in Book E for recording of mortgages, at pages 542, '43, '44.

In witness whereof I have hereunto set my hand and affixed the seal of my said office.

Done at office, at Cahoka, this 30th day of January, 1875.

[L. S.] THOS. E. PALMER, *Recorder.*

Objected to, and objection overruled, and excepted to at the time by plaintiff as illegal and incompetent.

17. Deed of Lucretia Jungher and others, by B. F. Hagerman, att'y-in-fact, to Buell and Fallon for 35 acres off of S. E. qr. 36, 64, 6, dated Dec'r 29, 1874, with covenants of warranty.

Objected to, and objection overruled, and excepted to by plaintiff as incompetent at the time.

18. Deed of B. F. Hagerman, att'y-in-fact for Jungher and others, to Samuel and John W. McKee for remainder of the said S. E. qr. section, dated Jan'y 19, 1873, with covenants of general warranty.

125 Objected to; objection overruled and excepted to at the time as incompetent and made to defraud this plaintiff and not material to the issues in this cause.

19. A certified copy of order of the county court of Clarke county, which is in words and figures as follows, to wit:

Transcript from the Records in the Office of the Clerk of the County Court of Clarke County, Missouri.

STATE OF MISSOURI, *County of Clarke:*

Be it remembered that at the February term, 1851, of the county court of said Clarke county, and on the 7th day of February, 1851, the following, among other, proceedings were had, to wit:

Ordered, That the clerk of this court be, and he is hereby, authorized to procure from the land office at Palmyra a map of all the taxable lands in Clarke —, provided such a map can be procured on reasonable terms.

And afterwards, to wit, at the November adjourned term, 1851, and on the 17th day of December, 1851, the following, among other, proceedings were had, to wit:

Ordered by the court, That the clerk of this court ascertain from the register of the land office at Palmyra the am't necessary to procure the field notes of all surveys of lands in Clarke county, and that he contract with the register for said field notes, provided the same can be procured for $20.00.

And afterwards, to wit, at the February term, 1852, of said court, and on the 5th day of said month, the following proceedings were had in said court, to wit:

A communication is this day presented to the court from the register of the United States land office at Palmyra stating that he will furnish the field notes of Clarke county for fifty dollars; and it is

ordered that the clerk of this court be, and he is hereby, authorized to procure said field notes for Clarke county at that price.

126 And afterwards, to wit, at the November term, 1852, of said court, and on the 4th day of said month, the following proceedings were had in said court, to wit:

John P. Hampton, clerk of this court, this day presents to the court the field notes of Clarke county, procured by said clerk under an order of this court, which said field notes are approved, and it is ordered that a warrant be drawn on the county treasurer in favor of L. P. Hallock for fifty dollars, being the amount of his account for furnishing same.

STATE OF MISSOURI, *County of Clarke:*

I, S. F. Sacket, clerk of the county court in and for the county and State aforesaid, do hereby certify that the foregoing are true and correct copies of record entries of the proceedings of the county court of said county had in relation to the matters therein named as the same appear of record in my office.

Witness my hand as clerk and the seal of said court.

Done at office, in Cahoka, this 14th day of February, 1877.

[L. S.] S. F. SACKET, *Clerk.*

Objected to by plaintiff; objection overruled, and excepted to at the time for the reason the same is irrelevant and incompetent.

20. Deposition of John P. Hampton, which is in the words and figures as follows, to wit:

Notice to Take Depositions.

In the Circuit Court Marion County, State of Mo.

ALBERT C. WIDDICOMBE, Plaintiff,
against
OLIVER P. CHILDRESS *et al.*, Defendants.

To above-named plaintiff:

You are hereby notified that depositions of witnesses to be read in evidence in the above cause on the part of the defendants will be taken at the office of the recorder of deeds in the town of Cahoka, in the county of Clarke and State of Missouri, on the thirteenth
127 day of February, 1877, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, and that the taking of said depositions, if not completed on that day, will be continued from day to day, at the same place and between the same hours, until completed.

JAMES HAGERMAN,
ANDERSON AND BOULWARE,
Att'ys for Defendants.

Service of the above notice is hereby acknowledged and issue of dedimus waived Feb'r. 2nd, 1877.

THOS. L. ANDERSON, *For Pl'ff.*

Depositions of witnesses taken at the office of the recorder of deeds, in the town of Cahoka, in the county of Clarke and State of Missouri, before me, the undersigned, B. E. Turner, a notary public in and for said county, on the 13th day of February, 1877, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, and on the 14th day of February, 1877, at the same place and between the same hours, in a certain cause now pending in the circuit court of Marion county, in the State of Missouri, wherein Albert C. Widdicombe is plaintiff and Oliver P. Childress *et al.* are defendants, on the part of the defendants.

Hampton.

JOHN P. HAMPTON, of lawful age, being duly sworn, deposes and says:

My name is John P. Hampton; age, 49 years; reside at Canton, Mo.; have lived in Canton since 1867; lived prior to that time in Clarke county, from 1840 to 1867, excepting the year 1847; I was deputy county and circuit clerk from 1844 to 1850, excepting one year these offices were united at that time; was county clerk from 1850 to 1856 and was deputy circuit clerk during the same time; was elected circuit clerk in 1856 and continued in that office till 1862.

Question. Look at the map now shown you and state what it is.

Answer. That is a map of taxable land in Clarke county made out in 1851 by L. P. Hallock, U. S. register of lands for Palmyra—that is, it was furnished by him. It was furnished under an
128 order of the county court made in 1851 authorizing me, as county clerk, to procure it. It was so procured by me as county clerk.

Question. State whether or not the map is now complete in all its parts as when secured by you as county clerk.

Answer. The map has been considerably defaced and a piece off of the first page of the map—about five inches by six inches out of the lower right-hand corner has been torn out. At the time the map was made, in 1851, it contained the taxable land at that time. Lands that became taxable after that time were afterwards entered upon the map by me and others. There was also a certificate on the map purporting to be given by Hallock and purporting to be signed by him. I have received letters from Hallock. I have also examined the field notes which were procured by me from Hallock, the U. S register of lands at Palmyra in the year 1852, under an order of the county court, which field notes are certified to by Hallock, and I now say that the handwriting on the field notes and the certificate on the field notes by Hallock and the handwriting in the letters which I have received from Hallock and the handwriting and signature on the certificate on the map were the same handwriting, to the best of my belief. The letters which I have received from Hallock have been lost or destroyed and the map is in the custody of the recorder of deeds for Clarke county and the field notes are in the custody of the surveyor of Clarke county.

Question. State, if you know, the contents of the certificate on the map made by Hallock.

Answer. I think that the certificate certified that the map contained a correct list of the taxable lands of Clarke county.

Question. Look at a part of the map now shown you, being the S. E. qr. of section (36) thirt-six, sixty-four (64), range six (6), and state what condition it is now in and whether or not it was certified as taxable property when the map was first made out.

129 Answer. That part of the map is badly defaced so you cannot see the names on it. I am positive it was certified as taxable land when first received by me.

JOHN P. HAMPTON.

Sworn to and subscribed before me this 13th day of February, 1877, at the place and between the hours first aforesaid.

[SEAL.] B. E. TURNER,
Notary Public.

Objected to, and objection overruled, and excepted to by plaintiff as irrelevant and immaterial and incompetent; objection overruled.

21. Deposition of Charles Henshaw, which is in words and figures as follows, to wit:

CHARLES HENSHAW, of lawful age, being duly sworn, deposes and says:

Live in Alexandria, Clarke county, Missouri; came to Clarke county in 1836; resided first at Barnesville, on Honey creek, now known as the Casscaddon Place; moved to Gregory Landing in 1843; resided there until 1845 or 1846; was absent a short time and then resided in Alexandria, where I have lived since 1851; Gregory Landing joins the southeast qr. of section thirty-six (36), sixty-four (64), six (6), and Alexandria is about four miles from it; Barnesville is about four miles from it. I have known the S. E. qr. of sec. 36, t'p 64, range 6, since 1838 or 1839.

Question. Were you acquainted with Edward Jenner Smith; and, if so, where and how long?

Answer. Yes; I knew him in 1837 and up to 1839; the S. E. qr. of sec. 36, t'p 64, range 6, was known as the Smith entry by all the people of the neighborhood and has continued to be so known; Smith's heirs claimed and exercised ownership over the land and that this fact was generally known in the neighborhood. The southwest qr. of sec. 36, t'p, 64, range 6, was known as the Wooden entry; Wooden lived in the neighborhood of the land, but Smith lived four or five miles from the land; there never was any conflict be-

130 tween Wooden and Smith as to the ownership of the southwest qr.

C. HENSHAW.

Sworn to and subscribed before me this 13th day of February, 1877, at the place and between the hours first aforesaid.

[SEAL.] B. E. TURNER,
Notary Public.

Objected to, and objection overruled, and excepted to by the plaintiff as incompetent and irrelevant; overruled by the court.

22. Deposition of J. B. Wooden, which is in words and figures as follows, to wit:

J. B. WOODEN, of lawful age, being produced and sworn and examined, on his oath says:

Reside at Gregory Landing, Clarke county, Missouri. I am in possession and use and occupy all the S. E. qr. of sec. 36, t'p 64, range 6 west, of Fox Slough, except fifteen acres held by O. P. Childress; all the land which O. P. Childress is in possession of is under fence; Childress never was in possession of any part of the land, except the fifteen acres under fence; Childress is my tenant now and was formerly the tenant of McKee and Company; I was one of the company and bought the whole interest out; as my tenant he occupies the tract containing about fifteen acres that he was in possession of when McKee and Co. owned the land.

Who owns the S. W. qr. of sec. 36, t'p 64, range 6 west?

The heirs of Robert Wooden did own it all. I am a grandson of Robert Wooden; it was divided among the heirs of Robert Wooden and is partially owned now by some of the Wooden heirs; some of them have sold out their interest to other parties.

J. B. WOODEN.

Sworn to and subscribed before me this 13th day of February, 1877, at the place and between the hours first aforesaid.

[SEAL.] B. E. TURNER,
Notary Public.

23. Deposition of James Crooks, which is in words and figures as follows, to wit:

JAMES CROOK, of lawful age, being produced, sworn, and examined, on his oath says:

131 I have resided in Missouri since 1829; I resided most of the time, up to the year 1852, north of Canton, in Lewis county, Missouri, & about 15 miles south of the S. E. qr. sec. 36, t'p 64, R. 6 west. Since 1852 I have resided at Gregory Landing, or near there. I have been acquainted with the S. E. qr., sec. 36, t'p 64, R. 6 west, since the fall of 1853, I think; I knew Edward Jenner Smith and Robert Wooden; have known them ever since they came to the county; think I have known them since 1835; that acquaintance continued until their death. I was well acquainted with the people in the neighborhood of the S. E. qr. sect. 36, t'p 64, range 6 west; the general understanding in the neighborhood was

that this tract of land was the Smith entry, and the general understanding in the neighborhood was that the S. W. qr. sec. 36, t'p 64, range 6 west, was the Wooden entry. The Wooden heirs exercised ownership over the S. W. qr. of — 36, t'p 64, range 6 west, and the Smith heirs over the S. E. qr. sec. 36, t'p 64, range 6 west. I married a daughter of Robert Wooden. I never knew of any conflict of ownership of the S. W. qr. sec. 36, t'p 64, range 6 west, between Smith and Wooden in their lifetime nor between their heirs since their death.

JAMES CROOKS.

Subscribed and sworn to before me this 13th day of February, 1877, at the place and between the hours first aforesaid.

[L. S.] B. E. TURNER,
Notary Public.

132 Objected to, and objection overruled by court. Excepted to by plaintiff as irrelevant and incompetent.

Deposition of O. F. Ensign.

24. Deposition of OSCAR F. ENSIGN, which is in words and figures as follows, to wit:

OSCAR F. ENSIGN, of lawful age, being produced, sworn, and examined, deposes and says:

I have resided in Clarke county, Missouri, since June 7th, 1836; was sheriff and collector of Clarke county from 1856 to 1860. The southeast quarter of sec. 36, t'p 64, range 6, was, in 1856, assessed to Mary C. Buck and the taxes paid to me in her name on that tract, and in the years 1857 and 1858 & 1859 it was assessed to Theodore Jungher and the taxes paid to me in that name, and, I think, B. F. Hagerman paid me for Jungher. I am now the surveyor of Clarke county; the field notes have been in my possession since the 1st day of January, 1877.

OSCAR F. ENSIGN.

Subscribed and sworn to before me at the place and between the hours aforesaid.

[L. S.] B. E. TURNER,
Notary Public.

Deposition Jno. Longford.

25. Deposition of John Longford, which is in words & figures as follows, to wit:

JOHN LONGFORD, of lawful age, being produced, sworn, and examined, deposes & says:

Live in Clarke county, Mo.; was sheriff and collector of Clarke from 1850 to 1854. In 1851 the southeast quarter of sec. 36,
133 t'p 64, range 6, was assessed to John Buck and the taxes paid by B. F. Hagerman, agent of Buck. In 1856 I was elected

clerk of the county court and took charge of the office in January, 1857. I found in the office at that time a map of the Clarke county made out by the register of U. S. lands at Palmyra, being the same map referred to by John P. Hampton in his deposition.

Question. Look at the map now shown you and state whether or not it is the same map, and whether or not it is complete in all its parts as it was at that time.

Answer. Yes, sir; this is the same map, what remains of it; up to the time I left the office it was in a good state of preservation and complete, but now the map is very much defaced; there was a certificate on it made by L. P. Halleck, register of U. S. lands for Palmyra; I have seen it hundreds of times; it was in my custody for a period of six years; the map was made out, arranging the t'ps and ranges in numerical order, commencing at fr'l t'ps 64 & 65, range 5; my recollection is that the register's certificate was on the lower right-hand corner of the first page of the map; where there is now a piece torn out of the map five by six inches.

Question. Look at that part of the map now shown you, being the southeast quarter of sec. 36, t'p 64, range 6, and say what condition it is now in and what was its condition at the time you were county clerk.

134 Answer. At the time I was clerk of the county court the plat showed the name of all the original purchasers very plain on the map; I am satisfied the southeast quarter of sec. 36, t'p 64, range 6, was so marked as entered, but it is now so defaced that I can't tell anything about it; I often assisted parties in examining the map with a view of determining if there were any vacant lands in the county and we never found that tract vacant.

JOHN LANGFORD.

Sworn to and subscribed to before me at the place and between the hours aforesaid.

[L. S.] B. E. TURNER,
Notary Public.

Objected to, and objection overruled; excepted to as irrelevant; objection overruled by the court.

Deposition of T. E. Palmer.

26. Deposition of Thomas E. Palmer, which is in words and figures as follows, to wit:

Deposition — T. E. Palmer.

THOMAS E. PALMER, of lawful age, being produced, sworn, and examined, says:

I am recorder of deeds for Clark county, Missouri.

Question. Look at the map now shown you and — what is it and in whose custody is it.

Answer. It is a map purporting to be a map of the original en-

tries of Clarke county lands; it is in my possession as recorder, and I received it when I received the other records of the county from my predecessor.

135 Question. State what condition it is now in.

Answer. It is now in a very much mutilated condition. There is a piece about five to six inches square torn out of the lower right-hand corner on the first page of township- 64 & 65, range 5. The southeast qr. of sec. 36, t'p 64, range (6) six, is now so obliterated that I can't tell anything about the original entries on it.

Question. Where did you reside from 1852 to 1865, and what was your business?

Ans. Resided in Clark county, and was assessor, from 1852 to 1863, of Clarke county.

Question. State, if you know, to whom the southeast qr. of sec. 36, t'p 64, range 6, was assessed from 1852 to 1863.

Answer. In 1855 I assessed it to John Buck; in 1856 I assessed it to Mary C. Buck; after that, in 1860, 1861, & 1862, it was assessed to Theodore Jungher, and my information is that in the year- 1857, 1858, & 1859 to Theodore Jungher.

Question. How long have you resided in Clarke county?

Answer. Since 1836.

THOS. E. PALMER.

Sworn to & subscribed before — at the place and between the hours aforesaid.

[L. S.] B. E. TURNER,
Notary Public.

Objected to and objection overruled & excepted — by plaintiff as incompetent & irrelevant.

136 *Deposition — H. M. Hiller.*

27. Deposition of H. M. Hiller, which is in words and figures as follows, to wit:

H. M. HILLER, of lawful age, being produced, sworn, & examined, deposes & says:

I have lived in Clarke county, Missouri, for 21 years. I was circuit clerk and *ex officio* recorder of deeds for Clarke county from April, 1865, to December 31st, 1870. At the time I became recorder there was in the office a plat book which had been sent from U. S. land office at Palmyra, which was the only evidence in any of the offices of Clarke county, Mo., of the original entries of lands, and my recollection is that it was regularly certified to by the register of lands.

Question. What was the condition of that map at the time you became clerk and recorder and when you ceased to be clerk and recorder?

Answer. The book was stitched together and in a fair state of preservation, and when I was recorder it showed all or nearly all of the entries legibly. There was some scratches upon it and some ink blots upon it.

Question. Describe its condition now.

Answer. The book is made of muslin pages with the paper pasted on it. The sheets are now entirely separated, no two of them being fastened together. Some of the sheets look as if they have
137 been wet, and the paper is separated from the muslin, and some of it has been scratched and torn off, and it is very badly blurred with ink.

Question. Describe particularly the sheets showing the entries in township 64, range 6, and townships 64 and 65, range five (5), giving their condition at the time you were recorder and at the present time.

Answer. Township sixty-four & sixty-five, range five (5), was the first sheet in the book when I was recorder, and was then, I think, *I think*, mainly legible, and has the appearance now of having been wet, and the paper has separated from the cloth, and there is scarcely an entry on it legible; at present the lower right-hand or southeast corner has a piece cut out or torn out of it five or six inches square. It was not so when I was recorder. From the appearance and from comparison with the other edges of the sheets I would say this piece has been cut or torn out in the last few years, because the ravelled edge has a fresher appearance than the other edge of the sheets or of this sheet up to the ravelled edge. The sheet containing plat of township sixty-four, range six, all of the north half of which, except a little on the north side, is now legible, the east side of the south half being section 24, 25, & 36, appears to
138 have been wet with water; the paper is separated from the cloth, and the entries of the three sections are entire- illegible; the west tier of sections on south half is in a dilapidated condition. The condition of the plat when I was recorder was different; it was in a much better condition; it was nearly all legible.

Quest. What was the condition of the S. E. ½ of section 36, 64, 6, during your term of office as shown by map?

Ans. About the close of my term of office I assisted in making an abstract of the lands of Clarke county, and in making the abstract I resorted — and used the map as the source of title & to show entries. The plat book or map at that time showed that E. J. Smith had entered the S. E. ¼ sec. 36, township 64, range six.

Quest. What did the map show as to the S. W. ¼, sec. 36, t'w'p 64, range six (6) west?

Ans. It showed that Rob't Wooden entered it.

Quest. On what sheet does t'w'p 63, range (5) five, appear on this map?

Ans. There was only a small fraction of t'w'p 63, range 5, west of the Mississippi river, and it was attached to the sheet that contained t'w'p 63, range 6, being the second leaf of the map.

139 Quest. What was the first sheet of the plat book when formed?

Ans. T'w'p 64 & 65, range 5 (five), out of which the piece before spoken of has been cut out.

Question. Look at the plat I now hand you of township sixty-three and sixty-four, range six west, and township sixty-four, range

five west, which is upon one sheet of paper, and which I ask the notary to mark as follows: "With H. M. Hiller's deposition, Exhibit A. Witness my hand and seal February 14th, 1877. B. E. Turner, notary public, Clarke county, Missouri," and to attach his seal thereto and compare it with the sheets townships number sixty-three and sixty-four, range six west, & township six, range 5, and state what similiarity, if any, there is between them.

Answer. The entries on the plat shown me, as far as they are made up, are the same as shown by the sheets of the plat book, wherever they are legible. Tne south half of the plat of — 63, R. 6, as shown by your map, is in Lewis county, and there is no plat sheet in this county and has been none showing these entries in Lewis county.

Question. State anything else you may desire to say of interest to the parties to this suit.

140 Answer. Well, to show my reasons for being positive that the plat book showed that the southeast quarter of — 36, 64, 6, was entered by E. J. Smith, I state that in making up my abstract book I was very careful to have the entries all correct; I copied the original entries into my abstract book myself, and after I had done so I had them called off section by section so as to correct any errors, if any were made, and that my book made up in 1870 shows the land to have been entered by E. J. Smith, and my only source of information was the plat book; if the southeast quarter of section 36, 64, 6, had shown a double entry I would have known it and the abstract book would have shown it; if there had been a double entry of it it would have been a very unusual circumstance and I would certainly have remembered it.

H. M. HILLER.

Sworn to and subscribed before me this 14th day of February, 1877, at the place and between the hours aforesaid.

[L. S.] B. E. TURNER,
Notary Public.

STATE OF MISSOURI, } ss:
County of Marion, }

141 I, B. E. Turner, a notary public in and for said county, do hereby certify that John P. Hampton, whose residence is in Canton, Lewis county, Mo., and Charles Henshaw, James Crooks, J. B. Wooden, Oscar F. Ensign, John Langford, Thomas E. Palmer, and H. M. Hiller, who reside in Clark county, Missouri, the above-named deponents, were by me first sworn to testify the truth, the whole truth, and nothing but the truth of their knowledge touching the matter in controversy in the cause now pending in the circuit court of Marion county, in the State of Missouri, wherein Albert C. Widdicombe is plaintiff and Oliver P. Childress *et al.*, defendants; that the foregoing depositions were all reduced to writing by me or in my presence and severally subscribed and sworn to by said deponents before me as follows: By deponents John P. Hampton, Charles Henshaw, J. B. Wooden, and James Crooks on the 13th day of February, 1877, between the hours of eight o'clock in the

forenoon and six o'clock in the afternoon, and by deponents Oscar F. Ensign, John Langford, Thomas E. Palmer, and H. M. Hiller on the 14th day of February, 1877, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon; all of which said depositions were taken by me, and were severally subscribed and sworn to by the witnesses at the office of the recorder of deeds,
142 in the town of Cahoka, in the county of Clarke and State of Missouri, in conformity in all respects with the annexed notice; and I further certify that my commission as notary public took effect May 20th, 1875, and that my term expires May 20th, 1881.

In testimony whereof I hereunto set my hand and notarial seal this 14th day of February, 1877.

[L. S.] B. E. TURNER.

All which said depositions are endorsed on the back:

"Received, sealed, opened, and filed by me on this 16th February, A. D. 1877.

J. H. DONLEY, *Clerk.*"

Objected and excepted to by plaintiff as incompetent and irrelevant; which objection was overruled by the court.

Testimony of Rush.

28. ALEXANDER W. RUSH, examined on the part of defendants, said: In the year 1858 I was register of the land office at Palmyra, Mo. A book was here shown witness and he testified as follows: This book is in my handwriting. I made it while register of said land office for Mr. Joseph R. Winchell. The certificate thereto was made by me at the time it bears date. This book, at the time it was made, was a copy of the entries then on the books in the register's office. Defendants then read the certificate attached to said book as follows:

"REGISTER'S OFFICE, PALMYRA, *Sept. 14th*, 1858.

143 I hereby certify that the foregoing is correctly copied from the tract books & records of this office.

A. W. RUSH, *Register.*"

Defendant- then read in evidence the following entries on page 180 of said book in words & figures as follows, to wit:

Parts of sections.	Section.	Towns'p.	Range.	Contents.	By whom purchased.	Residence.	Date of entry.	Remarks.
				Acres.				
	32	64	6 W.	640				
E. ½ S. E. qr.				80	John E. Trabue	Pike county, Mo.	Feb'y 3rd, 1830.	
E. ½ N. E. qr.				80	Taylor Jones	Ralls " "	March 29th, "	
W. ½ N. E. qr.				80	Phillip H. Clayton	Lewis " "	" 4th, 1834.	
W. ½ S. E. qr.				80	John E. Trabue	" " "	July 1st, "	
N. W. "				160	John D. Smith	Concordia " La.	Aug't 21st, 1830.	
S. W. "				160	Edward Jenner Smith	Lewis " Mo.	Nov. 18th, 1836.	
	33	64	6 W.	640				
W. ½ S. W. qr.				80	John E. Trabue	Pike county, Mo.	Feb'y 13th, 1830.	
S. E. ½ S. W. "				40	Same	Lewis " "	May 27th, 1833.	
W. ½ N. W. "				80	Alexander Waggener	" " "	Feb'y 24th, 1834.	
S. W. ½ S. E. "				40	Harvey Thompson	" " "	Nov. 20th, "	
N. E. ½ S. W. "				40	John E. Trabue	" " "	Dec. 30th, "	
E. ½ S. E. "				80	John Thompson	" " "	May 13th, 1835.	
E. ½ N. W. "				80	Philip H. Clayton	" " "	May 18th, "	
N. E. "				160	John D. Smith	Concordia " La.	" " "	
N. W. ¼ S. E. qr.				40	John Thompson	Lewis " Mo.	Jan'y 23rd, 1836.	
	34	64	6 W.	640				
N. W. qr.				160	John D. Smith	Concordia Co., La.	July 8th, 1835.	
South half & N. E. qr.				480	John C. Sowers	Augusta " Va.	Oct. 1st, "	
	36	64	6 W.	640				
West half & W. ½ N. E. qr.				400	Robert Wooden	Lewis county, Mo.	Nov. 8th, 1834.	
E. ½ N. E. qr. & S. E. qr.				240	Edward Jennier Smith	" " "	July 16th, 1836.	
	35	64	6 W.	640				
The whole				640	Edward Jenner Smith	" " "	Nov. 18th, 1836.	

145 A plat marked Ex. "A," with H. M. Hiller's deposition, was here shown witness and he testified as follows:

This plat is in the handwriting of William Wright, a former register of land office at Palmyra, Mo.

To which testimony of said Rush & the said documents pl'ff objected, which objection was by the court overruled; to which action of the court in overruling said objection pl'ff at the time excepted for the following reasons, to wit: That the record or book shown witness is a private record and is a copy of a copy, and is not the best evidence of which the nature of the case is susceptible. The plat also is excepted to for the same reason, it having no mark of official character or name on it by which it may be identified and purports to be a mere copy of a copy of original in existence. The oral testimony is excepted to for the reason it is incompetent and not evidence of a nature to contradict official record evidence.

Testimony of Davis.

Col. BENJAMIN DAVIS, affirmed and examined on the part of defendants, was acquainted with William Wright in his lifetime and succeeded him as register of lands; never saw Mr. Wright write his name; think I could distinguish his handwriting. Mr. Wright had a brother, Leland Wright, who did a great deal of writing in
146 the register's office at that time. His brother Leland's handwriting resembled very much William Wright's. I hesitate to say that it is William Wright's handwriting; probably it is. Judge Mahan, who wrote a great deal about the office, wrote a hand very much like William Wright. I think the plat marked with Hiller's deposition, marked "A," is William Wright's handwriting. Here plaintiff admit-ed that the plat shown witness is in the handwriting of Wm. Wright.

To all of which plaintiff objected; which objection was overruled and excepted to at the time for the reason that said evidence is irrelevant and immaterial to the issues in this case.

The defendant- here introduced in evidence said plat, marked Exhibit A in Haller's deposition, which plat is in words and figures as follows, to wit:

(Here follows diagram marked p. 147.)

147½ Objected, to and overruled, and excepted to at the time.

Testimony of T. E. Hatcher.

THOMAS E. HATCHER, sworn and examined on part of defendants:

I last saw Mr. William Wright in St. Louis about 1851; he ceased to be register about 1841; he left here about 1844; he is dead.

Objected and excepted to at the time by plaintiff as irrelevant.

Deposition Sam. McKee.

Deposition of Samuel McKee, which is in words and figures as follows, to wit:

Notice to Take Depositions.

In the Circuit Court of Marion Co., State of Mo.

ALBERT C. WIDDICOMBE, Pl'ff,
against
OLIVER C. CHILDRESS *et al.*, Def'ts.

To the above-named plaintiff:

You are hereby notified that deposition- of witnesses to be read in evidence in the above-entitled cause on the part of the defendants will be taken at the law office of James Hageman, in the city of Keokuk, in the county of Lee, and State of Iowa, on the ninth day of February, 1877, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, and that the taking of said depositions, if not completed on that day, will be con-
148 tinued from day to day at the same place and between the same hours until completed.

JAMES HAGEMAN,
ANDERSON AND BOULWARE,
Attorneys for Def'ts.

Service of the above notice is hereby acknowledged and issue of *dedimus* waived.

Feb. 2nd, 1877.

THOS. L. ANDERSON,
Att'y for Pl'ff.

Commission to Take Depositions.

STATE OF MISSOURI, } ss:
County of Marion, }

To any judge, notary public, justice of the peace, or other judicial officer of the State of Iowa, Greeting:

Know ye that we, in confidence of your prudence and fidelity, do by these presents authorize you to cause to come before you to be examined as witnesses in a cause pending in our circuit court for the county of Marion, in the State of Missouri, wherein Albert C. Widdicombe, of Cooper County, is plaintiff, and Oliver P. Childress and others are defendants, all and every such person, and at such time and place, as shall be named to you for that purpose by the said defendant, their attorney or agent; and we command you to examine all and every such person upon his
149 oath or solemn affirmation, first made or taken before you, to testify the whole truth touching his knowledge of anything relating to the said matter in controversy between the said parties; and that you do take such, his examination, and reduce the

same into writing. When you shall have so taken his examination you are to cause the witness to sign the same, and to that and each examination, at the foot thereof, you are to append your certificate, setting forth the facts that the examination was subscribed and sworn to, or affirmed, by the witness, and the day, as well as between what hours of the day, on what it was done, as also the place of residence of the witness, if known to you. Should any paper or exhibit be produced or proven or referred to by the witness you are to describe the same in his examination or cause it to be marked by him — as to establish its identity, and attach the same to his examination. The examination thus taken you will certify under your hand & seal of office or cause to be accompanied by a certificate of your official character, attested by the seal of the State, or, should it be more convenient, such authentication & proof of your official character may be made by the certificate and seal of the clerk of any court of record of any county of the State, district, or territory
150 in which you reside, stating also, in addition to the facts of his being clerk and that the court is one of record, that at the time when the depositions were taken you were an acting judge (or other such officer to whom this commission is addressed), and duly commissioned as such, and you will return the same and all exhibits produced to you annexed hereto, carefully closed up and under your seal, directed to the clerk of the circuit court in and for the county of Marion & State of Missouri, with the names of the said parties litigant endorsed thereon, with all convenient speed.

Witness Joseph H. Donley, clerk of said circuit court, with the seal thereof hereto affixed. Done at office, in Palmyra, this 2nd day of February, A. D. 1877.

[L. S.] JOSEPH H. DONLEY,
Clerk of Circuit Court.

Depositions of witnesses produced, sworn, and examined pursuant to the annexed notice and commission on the 9th day of February, in the year of our Lord 1877, at the office of James Hagerman, in the city of Keokuk, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day. before me, George A. Crane, a notary public in and for Lee county,
151 in the State of Iowa, in a certain cause now pending in the circuit court of Marion county, in the State of Missouri, between Albert C. Widdicombe, plaintiff, and Oliver P. Childers and others, on the part of the defendant.

SAMUEL MCKEE, of lawful age, being produced, sworn, and examined on the part of the defendant, deposeth & saith:

I reside at Keokuk, Iowa; I have heretofore been in the livery & wood business. John W. McKee and I purchased on the 1st day of January, 1873, of Mrs. L. A. Jungher and Sallie F. Johnson and H. Will Johnson, her husband, 125 acres off of the west side of southeast quarter, in section 36, township 64, range 6 west, in Clarke county, ia the State of Missouri. The price we agreed to pay therefor was at the rate of twenty dollars per acre. Possession of said land was

surrendered to us by B. F. Hagerman, the agent of Mrs. Jungher and Mrs. Johnson. We entered upon possession of same and continued to exercise open & notorious acts of ownership over it until we disposed of our interest. At the time we bought this above-described tract of land we also bought from the same parties the land adjoining it, which is described in the deed to us, dated
152 January 1st, 1873. Some time during the summer of 1873 we were cutting wood on said portion of the S. E. ¼ of sec. 36 and our other lands adjoining; the defendant, O. P. Childers, was working for us & we made an agreement with him to this effect, that whatever land he cleared off during that winter, ready for cultivation in the spring, we would fence, and he was to have the use of same for two years without paying rent therefor. He went to work & cleared off about 12 or 15 acres on the southern part of said S. E. ¼ west of Fox slough. We built a house for him in the fall of 1873. All the ground that he cleared laid north of the house and probably a little west. The amount of ground cleared by him didn't exceed fifteen acres. According to our agreement we fenced, in the spring of 1874, all the ground cleared by him. He took possession of the house and the fenced ground and continued in possession of it until the present time. At the commencement of this suit Childers was in possession of said house and the fenced ground, but was not in possession of any other part of said S. E. ¼ of sec. 36 (page 4), nor has he been in poss-ion of any part of said S. E. ¼ except said fenced part since, to my knowledge, but J. W. McKee and I were in possession until I transferred my interest to J. W. McKee
153 and J. W. McKee had possession until he deeded said land to J. B. Wooden. I personally made the agreement with Childers and us, and superintended the building of the fence and house. After this suit was brought against Childers I informed B. F. Hagerman, the agent of Mrs. Jungher and Mrs. Johnson, the parties who had warranted the title to us, that the suit had been brought. He promised, on behalf of them, that they would defend it. I notified Childers that these parties, represented by Mr. Hagerman, would defend the suit for themselves, for us, and for him. He said that was all right. He was never authorized by us to consent to a judgment against him for the possession of the (page 5) land. He continued to be our tenant until we disposed of our interest, but never paid any rent (3 lines at top of page). The plaintiff was on the land, so Mr. Childers told me, several times, but the plaintiff always avoided seeing myself or J. W. McKee, and was also in Keokuk several times, but never came to see us. The time when plaintiff was upon the land was after Childers' tenantcy began. Childers told me that the plaintiff would go around among the wood-
154 choppers who were working for us and notify them to quit chopping. I am satisfied that the house in which Childers lives is a little south of the south line of sec. 36, and is not on the S. E. ¼ of sec. 36.

SAM'L McKEE.

Subscribed and sworn to before me on the day, at the place, and within the hours aforesaid.

[L. S.] GEO. A. CRANE,
Notary Public.

All that part of said deposition on page 5, except three lines at top of page, objected and excepted to by plaintiff at the time as irrelevant and immaterial.

Deposition of J. W. McKee.

Deposition of J. W. McKee, which is in words and figures as follows, to wit:

J. W. McKEE, of lawful age, being produced, sworn, and examined on the part of the defendant-, deposeth and saith:

Sam'l McKee and I purchased of L. A. Jungher and Sallie F. Johnson and H. Will Johnson, her husband, on January 1st, 1873, all of S. E. ¼ of sec. 36, township 64, range 6 west, in Clarke county, State of Missouri, lying west of Fox slough, described in the deed to us as being 125 acres, more or less. The price we agreed to pay was twenty dollars per acre. After purchasing we took
155 possession of said land, and some time in the summer of 1873 we made a contract with def't, O. P. Childers, that he was to have for two years without rent all the land that he could clear during that winter, and we were to fence the same, and he was to have the use of the land for two years without rent as compensation for clearing it. Under this agreement he cleared about fifteen acres in the southern part of said S. E. ¼ sect. 36. We fenced it for him, and he took possession of it, and also of a house we built for him a little south of said S. E. ¼ of sec. 36. Samuel McKee and I continued in possession of the remainder of said land until Samuel McKee transferred his interests to me, and also until I deeded my interest to J. B. Wooden. Mr. Childers was in possession of the fenced portion at the commencement of this suit, and I believe still holds possession. Childers had no control, possession, or nothing to do with any other part of said S. E. ¼ of sec. 36, except that part enclosed by the fence spoken of before.

After this suit was begun Childers was informed by us and understood perfectly that this suit was to be defended by Mr.
156 Jungher and Mrs. Johnson through their agent, B. F. Hagerman, and he, the said Childers, had no authority whatever of us to consent to a judgment against him, and he attempted to do so without any notice to us.

The plaintiff was upon the land several times after Childers had rented of us, but he never called upon Samuel McKee or me. He was also in Keokuk, our place of business, several times, but never called upon us nor gave us any notice of his claims. At the time this suit was brought it was a notorious fact that we were in possession of said S. E. ¼ of sec. 36 and were exercising acts of ownership over it, and we were daily upon the land, one or the other of us.

We never heard of plaintiff's claim to the land until after we had taken possession and been to work some time on the land.

J. W. McKEE.

Subscribed and sworn to before me on the day, at the time, and within the hours first aforesaid.

[L. S.] GEO. A. CRANE,
Notary Public.

I, Geo. A. Crane, notary public within and for the county of Lee, in the State of Iowa, do certify that, in pursuance of the
157 annexed commission and notice, came before me, at the office of James Hagerman, in the county and State last aforesaid, Samuel McKee and J. W. McKee, who were by me severally sworn to testify the whole truth of their knowledge touching the matter in controversy aforesaid; that they were examined and their examination reduced to writing, and subscribed by them respectively in my presence on the day, between the hours, and at the place in that behalf first aforesaid, and their said depositions are now herewith returned, and I further certify that said Samuel McKee and J. W. McKee are residents of the county of Lee and State of Iowa.

Given under my hand and official seal, at Keokuk, in the county of Lee, and State of Iowa, this tenth day of February, A. D., 1877.

[L. S.] GEORGE A. CRANE,
Notary Public.

Which said last-named deposition- of Samuel McKee and J. W. McKee are endorsed as follows:

"Received, sealed, opened, and filed by me this 15th day of February, A. D., 1877.

"J. N. DONLEY, *Clerk.*"

Objected to by plaintiff and excepted to at the time for the reason that it is irrelevant.

Ag. Coll. Sc't 1520.

158 Copy of agricultural college scrip*t* No. 1520, of State of Kentucky, and the assignment thereon; also application to locate same on southeast quarter, section 36, township 64, range 6 W., & the certificate of location, which are in words & figures as follows, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Feb.*, 1877.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed copies are true & literal exemplifications from the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day & year above written.

[L. S.] J. A. WILLIAMSON,
Commissioner of General Land Office.

Land scrip No. 1520, for one quarter-section. Genuine M.

Colleges for agricultural and mechanic arts. Act of Congress, July 2d, 1862. For State of Kentucky.

Whereas, in pursuance of the act of Congress approved July 2d, 1862, entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," the State of Kentucky has accepted the grant provided by the said act, and under the same has,
159 consequently, a legal claim to three hundred and thirty thousand acres not located by the State itself, but liable to transfer, and may be located by the assignees of said State, according to assignment, attested by two witnesses, in the form on the back of this instrument; the locations by assignees, in satisfaction of the claim above mentioned, to be made in virtue of a regular series of scrip, a part of which is this land scrip No. 1520, for one quarter-section:

Therefore be it known that this scrip, when duly assigned & attested by two witnesses under such authority of the said State as the act of the Legislature thereof may designate, may be surrendered at any land office of the United States in satisfaction of a location of "one-quarter of a section" or for any quantity in one legal subdivision less than "one quarter-section," where such location is taken in full for "one quarter-section," the location to be restricted to vacant public lands subject to entry at private sale, at $1.25 per acre, mineral lands excluded, and whilst the aggregate location of all the claims under the said act may be taken in any of the Territories without limitation as to the quantity located in any one of them, yet in virtue of express limitation in the statute "not more than one million acres of the total aggregate scrip issue- under said
160 act can be located within the limits of any one of the States."

Given under my hand & seal of the Department of the Interior on the 22d day of July, A. D. 1863, and of the Independence of the United States the eighty-eighth.

Recorded vol. 22, page 20.

W. T. OTTO,
Acting Secretary of the Interior.

J. M. EDMUNDS,
Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 22, 1871.

The attached agricultural scrip No. 1520, State of Kentucky, issued under the act of July 2, 1862, having been once located and the fees paid therefor and said location cancelled because found illegal, this certificate is therefore attached, authorizing the relocation of said scrip by Thomas Widdicombe or his assignees without further payment of location fees.

WILLIS DRUMMOND,
Commissioner.

For value received I, Thomas Widdicombe, to whom the attached scrip No. 1520, State of Kentucky, was assigned, do hereby sell and transfer to Albert C. Widdicombe, of Cooper county and State of Missouri, this scrip attached, and authorize the said assignee to locate the same upon the terms & conditions specified in said scrip or as authorized by law.

Given under my hand and seal this 27th day of April, 1871.

THOMAS WIDDICOMBE. [SEAL.]

161 Witnesses:

F. WALTON.
O. S. KELSEY.

STATE OF PENNSYLVANIA, } ss:
County of Crawford, }

Be it remembered that on the 28th day of April, 1871, personally appeared before the undersigned, a recorder of deeds, &c., for the said county, Thomas Widdicombe, to me well known, and he acknowledged that he executed the foregoing assignment, and I certify that the said Thomas Widdicombe is the identical person to whom the attached scrip was assigned and who executed the foregoing assignment thereof.

In witness hereof I have hereunto affixed my hand & official seal on the day & year last above written.

A. M. SMITH, *Recorder.*

Agricultural college act of July 2, 1862.

Agricultural scrip No. 1520; register and receiver's No., 871.

LAND OFFICE, BOONVILLE, Mo., *May* 8, 1871.

We hereby certify that the attached scrip No. 1520 was on this day received at this office from Albert C. Widdicombe, of Cooper county, State of Missouri.

E. G. EVANS, *Register.*
JNO. N. GOTT, *Receiver.*

162 I, Albert C. Widdicombe, of Cooper county, State of Missouri, hereby apply to locate and do locate the southeast qr. (S. E. ¼) of section No. 36, in township No. 64, of range No. 6 west, in the district of lands subject to sale at the land office at Boonville, Mo., containing 160 acres, in satisfaction of the attached scrip, numbered 1520, issued under the act of July 2, 1862.

Witness my hand this 8th day of May, A. D. 1871.

ALBERT C. WIDDICOMBE.

Attest: E. G. EVANS, *Register*
JNO. N. GOTT, *Receiver.*

I request the patent to be sent to land office.

BOONVILLE, Mo., *May* 10, 1871.

We hereby certify that the above location *being* in accordance with law and instructions.

JNO. N. GOTT, *Receiver.*
E. G. EVANS, *Register.*

Agricultural college act of July 2d, 1862, — 871.

REGISTER'S OFFICE, *May 1st*, 1871.

Scrip No. 1520, State of Kentucky, in the name of M. E. Johnson, has this day been located by Albert C. Widdicombe upon the (S. E. ¼) southeast quarter of section 36, in township 64, range 6 west, subject to any pre-emption claim which may be filed for said land within forty days from this date.

E. G. EVANS, *Register.*

Contents of tract located, 160 acres.

163 The defendant offered in evidence letters A, B, C, D, certified from the Department of the Interior, relating to the exclusion of the pl'ff from practicing before the Department of the Interior, which letters are in words and figures as follows, to wit:

A.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Dec. 7th*, 1873.

A. C. Widdicombe, Esq., Washington, D. C.

SIR: In reply to your letter of the 6th int. asking for the reasons of your suspension as an attorney before this office I have to state that my reasons were fully set forth in the personal interview heretofore held with you and are substantially the same as stated in your letter of appeal to the Secretary and in my letter to the Secretary in reply thereto.

Very respectfully, &c.,

WILLIS DRUMMOND,
Commissioner.

"B."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Dec.* —, 1872.

Hon. Columbus Delan-, Secretary of the Interior.

SIR: I have the honor to acknowledge the reception by
164 reference from your office of a communication from A. C. Widdicombe complaining of the fact that I refused to recognize him as an attorney and requesting you to reverse my order excluding himfrom practice before the General Land Office. I would say in reply to your request for a report thereon that it is only necessary for me to call your attention to the fact that Mr. Widdicombe virtually admits that his associate, Mr. Herron, was guilty of acts and practices which would justify a refusal on my part to allow him to practice before the Land Office, and to state in addition thereto that Mr. Herron offered his services to Mr. Widdicombe while he was still a clerk in the Land Office, and imparted information in relation to certain illegal and suspended entries which he had obtained from records while acting as a clerk; that Mr. Widdicombe, well knowing

that the entries were made in violation of law and the rules of the office, and that they had been properly suspended for cancellation, and that they could not be legally patented, availed himself of the offer of Mr. Herron's services to secure patents for illegal and suspended entries associated him with him in the cases, and thereby wrongfully secured the issue of patents through the convenience of a clerk in the Land Office without once bringing the matter to my attention. How he can under such circumstances claim
165 that he is innocent, while admitting the guilt of Mr. Herron, is something that I cannot comprehend, and, recognizing the necessity of protecting the Government against practices of this character, I declined to further allow them to practice before me as attorneys or to have access to the clerks or records of the General Land Office. I could enter into a lengthy statement of details for the purpose of justifying my action if I thought it necessary to do so, but as you are already somewhat familiar with the transactions referred to I will not do so unless you desire it. Mr. Widdicombe's communication is herewith returned.

I am, sir, very respectfully, your obedient servant,

WILLIS DRUMMOND,
Commissioner.

"C."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *9th Dec.*, 1872.

SIR: I have received your report of — instant on the appeal of A. C. Widdicombe from your action excluding him from practice in your office. I decline disturbing your action in the case, and you will so inform Mr. Widdicombe.

I am, sir, very respectfully, your ob't servant,

C. DELANO, *Secretary.*

Hon. Willis Drummond, Com'r Gen. Land Office.

166 "D."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *June 7th*, 1873.

SIR: I transmit herewith for your files a letter addressed to the Department on the 6th inst. by A. C. Widdicombe concerning the action of your office in disbarring him. After due consideration of the views therein set forth I fail to discover any good reason for changing my decision of the 9th December last declining to disturb your action in the case, and you will be pleased to so inform Mr. Widdicombe.

I am, sir, very resp't'y, your ob't servant,

C. DELANO, *Secretary.*

Hon. W. W. Curtis, Acting Com'r General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Feb.* —, 1877.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed copies are true and literal exemplifications from the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] J. A. WILLIAMSON,
Commissioner of General Land Office.

Objected to by the plaintiff, and the objection sustained by the court; to which the defendant at the time excepted.

167 *Instructions — Land Dep't.*

The defendants read in evidence the following instructions from the Land Department, which are in words and figures as follows, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Feb. 20th*, 1877.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification of the instructions on file in this office and still in force.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[L. S.] J. A. WILLIAMSON,
Commissioner of General Land Office.

No. 455 (C., p. 234).

Circular to Register and Receiver of the United States Land Office.

GENERAL LAND OFFICE, *January 1st*, 1863.

* * * * * * *

"9th. Whenever you have reason to believe that any tract or tracts in your district heretofore offered at public sale may have been improperly withheld from private entry in consequence of errors in your books or in marking the sales upon your maps, or from any other cause whatever, you will seek information from this office in relation to such cases, and if it should then appear that the lands have been thus erroneously withheld from private entry you are particularly required to give notice of the fact by public advertisement in the most convenient newspaper, and to be put up in suitable places, setting forth that at a particular hour and day therein to be mentioned you will be prepared to receive applications to enter the lands designated in such notices. This notice should be given at least thirty days before entries are to be received, and in no event will you allow any such lands to be entered or located before the expiration of the time thus prescribed."

* * * * * * *

168 Defendants also exhibited in evidence the plat of the land now under fence in the said S. E. qr., which is as follows, to wit, in words, figures, and lines:

Plat of Land Under Fence.

(Here follows diagram marked p. 168.)

Section 36, in township 64 north, range 6 west.

Surveyed for B. F. Hagerman, of Keokuk, Iowa, the S. E. quarter of section 36, in township 64 north, range 6 west. There are $104\frac{98}{100}$ acres west of Fox slue and 54.06 acres east of and including the slue, and there are 14.82 acres now in cultivation in the said quarter-section and on the west side of the slue. You can easily see by reference to the above plat.

November 11th, 1875.

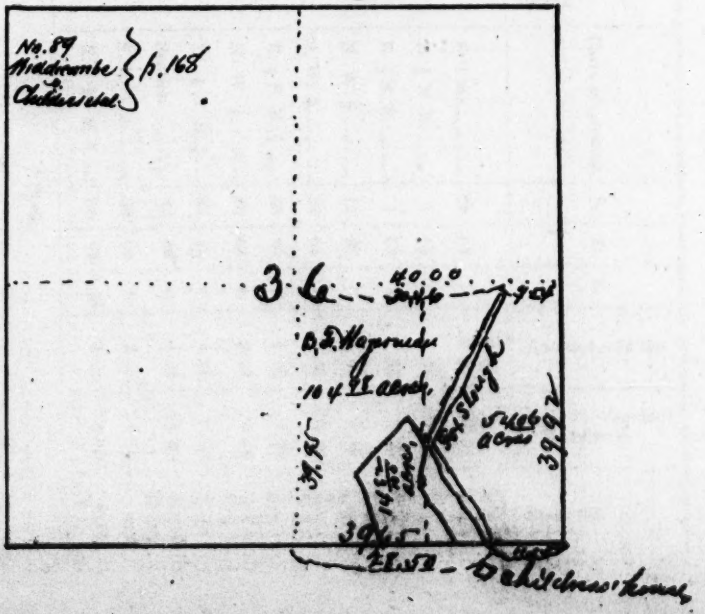
WOODFORD BECKETT,
Surveyor Clarke Co., Mo.

169 29. B. F. HAGERMAN, sworn on behalf of defendant, said:

I lived at Alexandria, Clarke county, Missouri, from 1848 to 1864. I was agent of Mrs. M. C. Buck for the S. E. qr. sec. 36, t'p 64, range 6, in Clarke county, Mo., in 1851 and paid taxes on same for her until she sold to Theodore Jungher. After the sale to Mr. Jungher I became his agent for said S. E. qr. & paid taxes for him until his death. He left no will. He left the defendant, Mrs. L. A. Jungher, his widow, & def't, Mrs. Sallie F. Johnston, his daughter & only child. After his death I became the agent of Mrs. Jungher & her daughter for said land until they sold it, & paid taxes for them during the time they owned it. This land was about 6 miles from Alexandria. I exercised control over it during —. I was agent for it for the above-named parties by paying taxes upon it, by protecting it from trespass, and by selling some timber off of it. It was generally known in the neighborhood as the Smith entry, and afterwards as the Buck land and then as the Jungher land. The land was not in cultivation until after McKees bought it, when they put a portion of it in cultivation through the defendant Childers. This land was worth in 1871 fifteen dollars per acre; I was acquainted with its value at that time. During the time I was agent for the land I saw the map or plat on file with the county clerk referred to in the testimony of John P. Hampton. The words E. J.
170 Smith were written on the S. E. qr. sec. 36, t'p 64, range 6 west, on said map or plat. I examined it frequently and copied it off three or four times. Since I have known this land no one else ever claimed it until Widdicombe set up claim to it. After this suit was brought I wrote to Mrs. Buck for all papers she had relating to this land; she sent me the following papers, which I now produce, to wit: A plat of said S. E. qr. & other lands, marked, with H. M. Hiller's deposition, Exhibit "A" (a full, true, & complete copy of which plat appears at page 163 of this transcript), and two certifi-

Section 36 in Township 6 North Range 6 West.

Plat of land surveyed



cates of redemption of this & other lands from State register for years 1847 & 1848 & 1850; which certificates of redemption are in words & figures as follows, to wit:

The following list of lands lying in the county of Clarke were sold in the year 1848 for taxes of 1847, which are subject to redemption until 1st October, 1850:

171

Name of owner.	Acres. 100ths.	Parts of section.	S.	T.	R.	Amount sold for.	Amount required to redeem.	State fee.
						$ c.	$ c.	
John Buck	500	Fr'l sec.	31	64	5	6 27	12 55	This list was purchased by Mr. Ford & double the amount paid by him required to redeem.
	80	E. ½ N. E.	1	63	6	1 65	3 30	
	53	E. ½ S. E.	1	63	6	1 65	3 30	
	160	N. W. ¼	12	63	6	2 80	5 60	
	160	S. W. ¼	29	64	6	2 51	5 02	
	80	E. ½ S. E. ¼	30	64	6	1 65	3 20	
	160	N. W. ¼	33	64	6	2 51	5 02	
	80	W. ½ N. E. ¼	33	64	6	1 65	3 30	
	640	Section	35	64	6	6 33	12 66	
	160	S. E. ¼	36	64	6	2 51	5 02	
	80	E. ½ N. E. ¼	36	64	6	1 65	3 30	*2 75

* State.

This list was returned delinquent for the taxes of 1848 and will be sold on the first Monday in October, A. D. 1849, the time for redemption at register's office having expired, and will have to be redeemed from the collector of Clarke county prior — the above date, or can be redeemed at this office within two years after sale by paying double the amount of individual purchases and interest with costs on State purchases.

ALLEN P. RICHARDSON, *Register.*

172

To whom assessed.	Acres.	100ths.	Parts of section.	S.	T.	R.	Amount of money due now for taxes & costs.
John Buck	80		E. ½ S. E. ¼	29	64	6	2 38
"	80		W. ½ S. W. ¼	29	64	6	
"	80		W. ½ N. W. ¼	33	64	6	2 38
"	80		E. ½ N. W. ¼	33	64	6	
"	80		E. ½ N. E. ¼	1	63	6	1 30
"	80		W. ½ N. E. ¼	33	64	6	1 30
"	500		Fr'l sect.	31	64	6	5 58
"	53		Fr'l E. ½ S. E. ¼	1	63	6	77
"	80		E ½ S. E. ¼	30	64	6	1 30
"	640		Section	35	64	6	5 60
"	160		S. E. qr.	36	64	6	1 30
"	80		E. ½ N. E. qr.	36	64	6	1 30

Lands Lying in Lewis County not Returned or Sold for Taxes, &c.

Jno. Buck to John. L. Menze, Dr.

1850.

Feb'y 9.	To am't paid expenses of T. N. Welch to Missouri to redeem y'r land	50
July 30.	To am't p'd cash for check on N. Y. to Allen J. Richardson, register of Missouri, of $65.17, to redeem lands sold for taxes in Oct., 1848	65 50
	To postage on letters to & from Missouri	60
		$116 10

REGISTER'S OFFICE, STATE OF MISSOURI,
CITY OF JEFFERSON, *March 27th*, 1851.

John Buck has this day produced to me the treasurer's duplicate receipts for the sum of twenty-one dollars and thirty cents, being the amount of State and county taxes assessed for the year 1850 on the following-described real estate:

173

To whom assessed.	Quantity—acres.	Parts of sec. or No. of survey.	Sec.	Town'p	Range.
John Buck	160	N. W.	33	64	6
Same	80	W. ½ N. E.	33	64	6
Same	160	S. W.	29	64	6
Same	80	E. ½ S. E.	30	64	6
Same	640	Section.	35	64	6
Same	160	N. W.	12	63	6
Same	160	S. E.	36	64	6
Same	80	E. ½ N. E.	36	64	6
Same	500	Fr'l.	31	64	5
Same	50	P't E. ½ S. E.	1	63	6

Situate in the county of Clarke. This, therefore, shall be a quietus for the taxes on said property for the year aforesaid.

ALLEN P. RICHARDSON,
Register of Lands.

The foregoing testimony of B. F. Hagerman objected to; the objection overruled by court, and the plaintiff at the time excepted to the opinion of the court in overruling said objection and admitting said testimony, it being irrelevant & incompetent.

Instructions of Land Department at Washington, read in evidence, as follows:

Instructions of Land Dep't.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Feb'y* 20, 1870.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification of the instructions on file in this office and still in force.

174 In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[L. S.] J. A. WILLIAMSON,
Commissioner of General Land Office.

No. 455. (C., p. 234.)

Circular to Registers and Receivers of the United States Land Offices.

GENERAL LAND OFFICE, *January 1st*, 1836.

* * * * * * *

"9th. Whenever you have reason to believe that any tract or tracts in your district heretofore offered at public sale may have been improperly withheld from private entry in consequence of errors in your books or in marking the sales upon your maps, or from any

other cause whatever, you will seek information from this office in relation to such cases, and if it should then appear that the lands have been thus erroneously withheld from private entry you are particularly required to give notice of the fact by public advertisement in the most convenient newspaper and to be put up in suitable places, setting forth that at a particular hour and day therein to be mentioned you will be prepared to receive applications to enter the lands designated in such notices. This notice should be given at least thirty days before entries are to be received, and in no event will you allow any such lands to be entered or located before the expiration of the time thus prescribed."

* * * * * * *

To the reading of which the plaintiff objected, which objection was overruled by the court, to the overruling of which plaintiff at the time excepted.

This is all the testimony offered by defendants.

The plaintiffs submitted and read in evidence to the court as follows, to wit:

Pl'ff's Evidence.

First. U. S. patent to A. C. Widdicombe for the S. E. ¼ of section 36, in township 64, of range 6 west, dated December 15, 1871, filed for record in Clarke Co., Mo., January 26, 1872.

Which said patent is in words and figures as follows, to wit:

175 *Patent to Widdicombe.*

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the act of Congress approved July 2, 1862, entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," there has been deposited in the General Land Office scrip No. 1520 for one quarter-section of land in favor of the State of Kentucky, duly assigned by the proper authority of the said State to Thomas Widdicombe, and by him to Albert C. Widdicombe, with evidence that the same has been located upon the southeast quarter of section 36, in township 64, of range six west, in the district of lands subject to sale at Boonville, Missouri, containing one hundred and sixty acres, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general, Now, know ye that there is granted by the United States unto the said Albert C. Widdicombe, as assignee as aforesaid, and to his heirs the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Albert C. Widdicombe, as assignee as aforesaid, and to his heirs and assigns forever.

In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be affixed.

Given under my hand, at the city of Washington, the fif-
176 teenth day of December, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States the ninety-sixth.

By the President:

U. S. GRANT,
By J. PARRISH, *Sec'y.*

[SEAL.]

C. B. BRYNTON,
Recorder of the General Land Office.

Recorded, vol. 11, page 272.

Second. A certified copy of cash application No. 14513 of Edward Jenner Smith, dated July 6, 1836, for the S. W. ¼ of section 36, T. 64, R. 6 W., and other lands; which said "certified cash application is in words and figures as follows, to wit:

No. 14513.

LAND OFFICE, PALMYRA, Mo., *July* 6, 1836.

I, Edward Jenner Smith, of Lewis county, Missouri, do hereby apply to purchase the E. half S. E. qr. 30, E. half S. E. qr. 31, E. half N. E. qr. and E. half S. E. qr. 25, E. half N. E. — and S. W. qr. of section 36, in township 64 north of the base line, range No. 6 west of the fifth principal meridian, containing 560 acres, according to the returns of the surveyor general, for which I have agreed with the register to give at the rate of $1.25 per acre.

EDWARD JENNER SMITH.

3d. A certified copy of patent certificate No. 14513 to Edward Jenner Smith for same land as above; which is in words and figures as follows, to wit:

Patent Cert. 14513.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February 17th*, 1877.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed copies numbered 1, 2, 3, & 4 are true & literal exemplifications from the originals on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[L. S.]

J. A. WILLIAMSON,
Commissioner of General Land Office.

177 No. 14513.

LAND OFFICE AT PALMYRA, Mo., *July* 6, 1836.

It is hereby certified that, in pursuance of law, Edward Jenner Smith, of Lewis county, State of Missouri, on this day purchased

the lot or E. half S. E. qr. sect. 30, E. half S. E. qr. 31, E. half N. E. qr. and E. half S. E. qr. 25, and E. half N. E. qr. and S. W. qr. of section No. 36, in township No. 64, of range No. 6 west, containing 560 acres, at the rate of one dollar and twenty-five cents per acre, amounting to seven hundred dollars and — cents, for which the said Edward Jenner Smith has made payment in full, as required by law.

Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Edward Jenner Smith shall be entitled to receive a patent for the lot above described.

WM. WRIGHT, *Register.*

4. A certified copy of original duplicate receipt No. 14513 issued by the receiver on said application of E. J. Smith for southwest qr. 36, 64, 6 W., which is in words and figures as follows, to wit:

Duplicate Rec't 14513.

No. 14513.

RECEIVER'S OFFICE AT PALMYRA, MO., *July* 6, 1836.

Received from Edward Jenner Smith, of Lewis county, Mo., the sum of seven hundred dollars and no cents, being in full for the E. half S. E. qr. sect. 30, E. half S. E. qr. 31, E. half N. E. qr. and E. half S. E. qr. 25, and E. half N. E. qr. and S. W. quarter of section No. 36, in township No. 64 north of the base line, of range No. 6 west of the 5th principle meridian, containing five hundred and sixty acres and — hundredths, at $1.25 per acre.

$700.

(Signed in duplicate) WILLIAM BLAKEY, *Register.*

5th. A certified copy of the register of receipts issued by the receiver of public moneys at Palmyra, Mo., July 6, 1836, of receipt No. 14513 to Edward Jenner Smith for the southwest quarter section 36, T. 64, R. 6 W., and other lands, duly certified to by receiver & register July 31, 1836, which is in words and figures as follows, to wit:

Register of Receipts Issued by the Receiver of Public Moneys at Palmyra, Missouri, for Lands Sold from the 1st day of July, 1836, to the 31st day of the same Month, Inclusive.

Date of receipt.	No. of receipt.	By whom purchased.	Residence.	Tract purchased. Section or part of section.	No. of section.	No. of township.	No. of range.	Quantity.	Price per acre.	Purchase-money.
* *	*	*Name.* * * * *	* * *	* * *	*	*	*	*Acres.* *	*	*
1836.										
July 6.	14513	Edward Jenner Smith--	Lewis Co., Mo.---	E. ½ S. E. 30, E. ½ S. E. 31, E. ½ N. E., E. ½ S. E. 25, E. ½ N. E. & S. W. ------	36	64	6 W.	560	1 25	700
* *	*	* * * * *	* * *	* * *	*	*	*	*	*	*

RECEIVER'S OFFICE,
PALMYRA, MO., *July* 31, 1836.

William Blakey, receiver:

It is hereby certified that the foregoing register of receipts has been examined under my direction and compared first with the maps and tract books; secondly, with the certificates of purchase and the receiver's receipts for the same; and, thirdly, that all these documents have been compared with each other.

(Signed) WILLIAM WRIGHT, *Register.*

178 6th. A certified copy of abstract of land sold at Palmyra land office for the month ending July 31, 1836, showing sale of S. W. ¼ of section 36, T. 64, R. 6 W., and other lands for entry No. 14513 to Edward Jenner Smith, dated July 6, 1836, and duly certified to, July 31, 1836, by Register Wright, which is in words and figures as follows, to wit:

Abstract of Land sold at the Land Office at Palmyra, Missouri, from the first day of July, 1836, to the thirty-first day of same month, inclusive.

When sold.	General Land Office folio.	By whom purchased.	Residence.	No. of receipt.	Tract purchased. Section or part of section.	No. of section.	No. of township.	No. of range.	Quantity.	Price per acre.	Purchase-money.
		Name.							*Acres.*		
*	*	* * * * *	* * *	*	* * * * *	*	*	*	*	*	*
1836.											
July 6	N.R. 126	Edward Jenner Smith --	Lewis Co., Mo.----	14513	E. ½ S. E. 30. E. ½ S. E. 31. E. ½ N. E. E. ½ S. E. 25. E. ½ N. E. & S. W.-------	36	64	6 W.	560	$1 25	$700
*	*	* * * * *	* * *	*	* * * * *	*	*	*	*	*	*

I hereby certify that the foregoing abstract has been examined by me and under my direction, and compared first with the maps and tract books; secondly, with the certificates of purchase and the receiver's receipts for the same, and, thirdly, that all these documents have been compared with each other.

(Signed) WM. WRIGHT, *Register.*

REGISTER'S OFFICE, PALMYRA, MISSOURI, *July 31st*, 1836.

(Signed) WM. WRIGHT, *Register.*

7. A certified copy of receiver's register of receipts (marked Exhibit "G") in the local land office of receipts, No. 14513, of Edward Jenner Smith, for above land, which is in words and figures as follows, to wit:

179 *Register of Receipts Issued by the Receiver of Public Moneys at ——, ——, for Lands Sold from the — day of ——, ——, to the — day of the same month, inclusive.*

Date of receipt.	No. of receipt.	By whom purchased.	Residence.	Tract purchased. Section or part of section.	No. of section.	No. of township.	No. of range.	Quantity.	Price per acre.	Purchase-money.
		Name.						*Acres.*		
1836.	*	* * * *	* * *	* * * *	*	*	*	*	*	*
July 6.	14513	Edward Jenner Smith --	Lewis county, Mo.	E. ½ S. E. 30. E. ½ S. E. 31. E ½ N. E. E. ½ S. E. 25. E. ½ N. E. and S. W.-----	36	64	6 W.	560	$1 25	$700
*	*	* * * *	* * *	* * * *	*	*	*	*	*	*

U. S. LAND OFFICE,
BOONVILLE, MO., *January* 25, 1877.

I, Gustave Reiche, register of the United States land office at Boonville, Mo., do hereby certify the foregoing to be a true and correct copy from the receiver's monthly report and as fully — it appears thereon of record at this office, formerly Palmyra, Mo., land office, as far as said report on entry No. 14513 by Edward Jenner Smith is concerned.

In testimony whereof I have hereto subscribed my name (there being no official seal in use in this office), at office, in Boonville, Mo., the day and year last above written.

GUSTAVE REICHE, *Register.*

8. A certified copy of abstract of receiver's quarterly account current of lands sold for receipt No. 14513 for southwest quarter of section 36, T. 64, R. 6 W. (marked Exhibit "J" in depositions), which is in words and figures as follows, to wit:

DR. *The United States in Account Current with William Blakey, Receiver of Public Moneys for the District of Lands Subject to Sale at Palmyra, in the State of Missouri, for the Quarter Year Commencing on the 1st July and Ending on the 30th September*, 1836.

Date of purchase.	No. of receiver's receipt.	By whom purchased.	Tract purchased. Section or part of section.	Township.	Range.	Quantity.	Price per acre.	Amount of purchase-money.
						Acres.		
1836.		* * * *	* * * *	*	*	*	*	
July 6.	14513	Edward Jenner Smith	E. h'f S. E. 30. E. h'f S. E. 31. E. h'f N. E. E. h'f S. E. 25. E. h'f N. E. and S. W. 36	64	6 W.	560	$1 25	$700

180

U. S. LAND OFFICE,
BOONVILLE, MO., *January* 25, 1877.

I, Gustave Reiche, register of the United States land office at Boonville, Mo., do hereby certify the foregoing to be a true & correct copy from the receiver's quarterly report and as fully as it appears thereon of record at this office, formerly Palmyra, Mo., land office, as far as the report on entry No. 14513 by Edward Jenner Smith is concerned.

In testimony whereof I have hereto subscribed my name (there being no official seal in use in this office), at office, in Boonville, Mo., this day and year last aforesaid.

GUSTAVE REICHE, *Register.*

9. A certified copy of United States patent No. 14513, dated August 30, 1838, for southwest quarter of section 36, T. 64, R. 6 W., to Edward Jenner Smith, which is in words and figures as follows, to wit:

Patent 14513.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February 17th*, 1877.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed copy of patent in favor of Edward Jenner Smith is a true and literal exemplification from the record in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to affixed, at the city of Washington, on the day & year above written.

[L. S.] J. A. WILLIAMSON,
Commissioner of General Land Office.

181 Certificate No. 14513.

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas Edward Jenner Smith, of Lewis county, Missouri, has deposited in the General Land Office of the United States a certificate of the register of the land office at Palmyra, whereby it appears that full payment has been made by the said Edward Jenner Smith, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the east half of the southeast quarter of section thirty, east half of the southeast quarter of section thirty-one, east half of the northeast quarter and east half of the southeast quarter of section twenty-five, and east half of the northeast quarter and southwest quarter of section thirty-six, in township sixty-four, of range six west, in the district of lands, subject to sale at Palmyra, Missouri, containing five hundred and sixty acres, according to the official plat of the survey of the said lands, returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said Edward Jenner Smith: Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted and by these presents

182 do give and grant unto the said Edward Jenner Smith and to his heirs the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereto belonging, unto the said Edward Jenner Smith and to his heirs and assigns forever.

In testimony whereof I, Martin Van Buren, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the thirtieth day of August, in the year of our Lord one thousand eight hundred and thirty-eight, and of the Independence of the United States the sixty-third.

By the President: MARTIN VAN BUREN,
[L. S.] By M. VAN BUREN, JR., *Secretary.*
JOS. S. WILSON,
Acting Recorder of the General Land Office, ad interim.

Recorded vol. 28, page 499.

10. A copy of official letter from the Commissioner of the General Land Office to William Wright, register at Palmyra, dated August 1st, 1839, stating that John D. Smith had surrendered his receipt (duplicate) No. 14513, and requested that patent therefor be returned for delivery to Mr. Smith in Washington, D. C., which is in words and figures as follows, to wit:

Letter of Com'r — Land Office.

GENERAL LAND OFFICE, *August 14th*, 1839.

SIR: I have to request that you will return to this office patents No-. 14513 and 16640, in order that the same may be delivered
183 to John Smith, Esq., of this city, who has deposited in this office the corresponding duplicate receipts. The patents above referred to were transmitted to you on the 24th June and 24th July last.

Very respectfully, your ob'd't serv't,
JAS. WHITCOMB,
Commissioner.

The register of the land office, Palmyra, Mo.

UNITED STATES LAND OFFICE,
BOONVILLE, MISSOURI, *February* 24, 1877.

I, Gustave Reiche, register of the land office at Boonville, Mo., do hereby certify that the foregoing is a true and literal exemplification of the original letter on the files of this office.

In testimony whereof I have subscribed my name on the day and year above written.

I further certify that this office is provided with no official seal.
GUSTAVE REICHE, *Register.*

Defendant- objected; objection overruled; to which ruling of the court defendants at the time excepted.

11. A copy of an official letter from Commissioner of the General Land Office, dated July 5th, 1847, that an application of purchase land can be altered under no circumstances, which is in words and figures as follows, to wit:

Letter.

GENERAL LAND OFFICE, *January 5th*, 1847.

SIR: Herewith I again return you Plattsburg, Mo., certifi-
184 cate No. 4917, received in your letter of October 16, 1846.

In your letter of the above date you state that the "gentleman who transacted the business of the late register has informed you that he is satisfied that the purchaser (Mr. Perry) desired to purchase lot 2 of the N. W. ¼ of section 18, T. 63, R. 30, from the fact that he has marked lot 2 on the map, and also specified the number of acres contained in said lot, and that in consequence of your not having received a reply to your letter to Mr. Perry you deem yourself justified in correcting the application" on file in your office.

In reply to the portion of your letter above quoted it is only necessary to state that if the purchaser signed an application for lot No. 1, either written by himself or by any other person, he would have no right to alter or amend that application, much less the register or the receiver, the only remedy for him in the case being an application for a change of entry under the circular of the 31st of August, 1830. You are therefore instructed to restore the description of the tract in the enclosed certificate to conform to the application as it was before you altered it, and also to certify on the application that you did alter it by striking out the word "one" and inserting the word "two," which alteration was disapproved by this office, and refer to this letter by its date. You will then return the enclosed certificate to this office and notify Mr. Perry of the receipt and tenor of this letter. Should a change of entry be applied for and
185 not allowed the certificate will be returned to you for correction, as regards the contents of lot No. 1, in order that a patent may issue for that lot, and Mr. Perry may then make application for a repayment of the amount overpaid. The selection by the State of Missouri will remain suspended until Mr. Perry's entry is finally settled. The foregoing disapproval of the alteration of an application under any circumstances will govern you in the other case referred to in your letter.

Very respectfully, your ob't serv't,

(Signed) JAMES H. PIPER,
Acting Commissioner.

Register of the land office, Plattsburg, Mo.

UNITED STATES LAND OFFICE,
BOONVILLE, MO., *July* 24, 1877.

I, Gustave Reiche, register of the land office at Boonville, Mo., do hereby certify that the foregoing is a true & correct copy of the original letter of the Commissioner of the General Land Office as the same appears upon the files in this office. I further certify that this office is provided with no official seal.

Given under my hand this 24th day of July, 1877.

GUSTAVE REICHE, *Register.*

Objected to and objection overruled & excepted to at the time.

No. 12. A certified copy of official letter of Commissioner of the General Land Office, dated May 30th, 1845, stating that land once offered at public sale and erroneously withheld from private
186 entry for any cause to be sold to the first applicant therefor, which is in words & figures as follows, to wit:

Letter.

GENERAL LAND OFFICE, *May* 30, 1845.

SIR: Your communication of the 7th inst. in reference to the application by Judge King, of Ray Co., Missouri, to enter the W. ½ of sect. 6, T. 51, range 27, has been handed me by that gentleman. On examining the subject I find that a letter was addressed to your office on the 2d May, 1844, and that you were then informed that the Clinton office had been written to for the purpose of ascertaining whether or not the above-mentioned tract had been selected some years since for school purposes, then in the Lexington district. Since the date of the late Commissioner's letter to you a communication has been received from the Clinton office enclosing a "paper which seems to answer the description" of the report of proposed school selections, which was returned to the Lexington office for correction on the 9th May, 1833. In this report the tract claimed by Judge King appears as selected for T. 51, range 24; that township, however, north of the Missouri river contains only a sufficient number of acres to entitle it, according to the rates fixed by the act of May, 1826, to one-half section of 320 acres, and the contents of its fract'l 16th section are $306\frac{2}{100}$ acres, leaving a deficiency of only $13\frac{98}{100}$ acres. There being no provision of law by which so small a quantity as 13 acres can be selected, the township must be
187 regarded as having its full quota of school land.

This difficulty, then, no longer exists in the way of Judge King's application. The township (51–27), however, in which is situated the tract applied for, appears to have been offered at public sale in the year 1824, and the half-section which Judge King is desirous of purchasing to have been withheld from private entry in consequence of its being noted as a school section. If Judge King was the first applicant therefor he is, in my opinion, entitled to make the entry, he having done all the law required him to do—make the demand and tender the purchase-money. Should, however, other applications have been made for the land in question prior to that of Judge King, then the case comes within the circular of 1st July, 1836, and the 30 days' notice in reference to the tract will have to be given.

Respectfully, &c.,

JAMES SHIELDS,
Commissioner.

Register of land office at Plattsburg, Mo.

UNITED STATES LAND OFFICE,
BOONVILLE, Mo., *Feb'y* 12, 1877.

I, Gustave Reiche, register of the land office at Boonville, Mo., do hereby certify that the foregoing letter is a true & literal exemplification from the original letter of the Commissioner of the General Land Office as the same appears on the files of this office.

In testimony whereof I have hereunto subscribed my name the day and date first aforesaid, and I certify that this office is
188 provided with no official seal.

GUSTAVE REICHE, *Register.*

Objected to; objection overruled; to the overruling of which def'ts excepted at the time.

Testimony of Childers.

13. OLIVER P. CHILDERS, sworn and examined on the part of plaintiff:

Was employed to go upon the land in controversy by Samuel McKee, of Keokuk, Iowa, in the spring of 1873; no improvements were upon the land at that time or had been prior thereto; the land was timber land in Mississippi bottom; I took possession of the land in May, 1873, and began chopping wood there for Mr. McKee; soon after I commenced cutting timber on the land I made a verbal agreement or contract with McKee that I was to have the use of all land I cleared for two years after I cleared it, and thereafter McKee should be entitled to a portion of the crop or rent; that McKee was to fence it as fast as I cleared; I cleared & Mr. McKee fenced about fourteen or fifteen acres the first year I took possession; I was cutting on the land pretty much all the time; cleared some eighteen or twenty acres outside the fence & read- to fence prior to the institution of this suit; considered that I was authorized to chop over & clear any portion of the land I desired, and the portion I cleared is the best portion of it.

Cross-examination by defendants:

189 The house built by Mr. Kee soon after I took possession of the land & began chopping wood is not on the land in controversy, but a short distance over or from the south line of it. This house was completed some time in the early part of the fall of 1873. When Widdicombe came to the place, in the summer of 1874, I was cutting timber on the land in controversy and about the centre part of it. I had cut the timber off a long strip nearly across the tract, for my object & aim was to clear the best portion of it first. My agreement with Mr. McKee was that I would clear fifty acres in the three years and that he would fence as I cleared it and that I should have the exclusive profits arising from the cultivation of all I cleared the two first years. McKee did not fence any after the first year, although he promised repeatedly to fence the portion I cleared outside the fence & which I had prepared and cleared in accordance with our agreement. McKee paid me for all the cord-wood I cut.

190 *Testimon- of Widdicombe.*

A. C. WIDDICOMBE sworn and examined:

"I am plaintiff in this cause. I applied for and entered the land in controversy at the Boonville land office, as shown by my application in evidence, in the early part of 1871. Never was in Clarke county, Mo., or the northeastern part of the State prior to June, 1874. Never saw the Hampton map of Clarke county referred to in evidence prior to that time. Never saw any records, other than the Government or U. S. records, having reference to the land in controversy prior to that time. I had heard of no person claiming the land in controversy prior to the time I went to Clarke county, in 1874. The defendant, Childers, was cutting timber upon the land when I went there, in June, 1874, and was cutting about the middle of the tract, so he informed me.

Cross-examined by defendants:

I discovered the southeast quarter 36, 64, 6 W., was vacant while employed in making an examination of the records to purchase for a party in Scotland county, an 80-acre tract where there were three applicants at the same time for the same piece of land, one of whom was the sheriff of Scotland county. There had been a correction, alteration, or erasure, call it as you please, on the plat and tract books in the register's office, in section 36, township 64, range 6 west, and I saw it before I made the entry. The plat book, whereon the numbers of entries are posted, in section 36 and on the southeast quarter of said section, there is a perceptible erasure. On the tract book the letter "W" in the Smith entry appears to have been made with a heavy stroke of the pen and has a much heavier and darker appearance than the letter "S" preceding it, and has the appearance of having been changed from some other letter, and the letter "E" is the only letter over which the letter "W" could have been written so as to have formed a correct description of any other entry, either in that or any other section, or in the description of lands similarly situated.

The foregoing is all the evidence introduced, either by plaintiff or defendants, on the trial of this cause.

Whereupon the plaintiff moved the court to declare the land as follows:

First. That if plaintiff applied to enter the land in controversy and the officers of the land office ascertained from their records that the land had not been previously applied for or sold, notwithstanding the marking or obliteration of a portion of their records, and issued to the plaintiff a patent certificate upon which a patent subsequently issued to him, the knowledge of such obliteration or mutilation is not sufficient notice to defeat plaintiff's patent, unless it be shown that such patent was obtained through fraud of the rights of defendants or those under whom they claim, who intended to make such entry.

191 Second. That a written memorandum is the basis of the contract between an applicant to purchase and the authorized agents of the United States to sell lands, and such agents must conform their records to such written memorandum; that if defendants or those under whom they claim filed a legal memorandum containing land different from that intended to be entered by them it was the duty of the officers of the land office to correctly post their records in accordance with such written memorandum, and if a portion of such records were correctly posted and others erroneously posted said officers were authorized to rectify all errors so as to conform their records with the original or only act or memorandum signed by defendant- or those under whom they claim.

Third. To entitle defendants to recover it must be shown that they or those under whom they claim filed a written memorandum for the land in controversy with the register and paid the receiver the purchase-money therefor. The mere fact that they intended to file such written memorandum and pay for other land — that embraced in such written memorandum would not entitle them to defeat the plaintiff's patent from the Government, unless it be shown that such patent was obtained through fraud of their rights as such intended applicants.

192 Fourth. That if defendants or those under whom they claim intended to purchase the land in controversy, but through ignorance or mistake failed to do so and purchased other land than that which they intended to do, and which plaintiff did subsequently purchase without knowledge of their intention, then defendants cannot defeat plaintiff's patent, unless it be shown that such patent was obtained through fraud of their rights as such intended purchasers, although it appear that the land so purchased by defendants or those under whom they claim had been previously sold by the United States.

Fifth. That if Edward Jenner Smith, under whom the defendants claim, on the 6th day of July, 1836, made application to the register of lands to enter the S. W. qr. of sec. 36, T. 64, R. 6 W., instead of the S. E. qr., which he intended to enter, and paid for the said S. W. qr. and received the receiver's receipt for said S. W. qr., and afterward, in the year 1839, surrendered to the Government his receiver's receipt and received a patent for said S. W. qr. and never occupied the same nor applied to the Government to correct said mistake, if one existed, and that in 1871 the plaintiff was informed by the register of lands at Boonville, Missouri, that said S. E. qr. was subject to entry and said plaintiff entered the same, and in December, 1871, the Government issued & delivered to plaintiff a patent for said S. E. qr., and that the defendant Childers was in posses-

193 sion of said S. E. qr. or any part thereof at the time of the institution of this suit, then the plaintiff is entitled to a verdict.

Sixth. Plaintiff asks the court to declare the law to be that upon the pleading and proof the defendants are not entitled to a decree on their cross-bill nor to a judgment on the action in ejectment.

Seventh. That the defendants in the cross-bill show no title, either in law or equity, upon which they can defeat the plaintiff's patent.

Eighth. Although the court may find from the evidence that Edward Jenner Smith, on the 6th day of July, 1836, applied to the register of the land office at Palmyra, now Boonville, Missouri, to enter the southeast qr. section 36, T. 64, R. 6 W., but accepted from the receiver of said office a receipt for the purchase of the southwest quarter of said section, township, and range, which he afterwards, to wit, in 1839, surrendered to the General Land Office—said receipt—and accepted a patent for the said southwest qr., and he and his grantees have been since that time in possession of the said patent—since 1839—without any attempt to have his title established to the said southeast quarter of said section, township, and range, then they are guilty of such laches as to deprive them of the relief prayed for in their cross-bill.

Which said declarations of law asked by pl'ff the court re-
194 fused; to the action & judgment of the court in refusing said declarations of law the pl'ff at the time excepted.

The defendants moved the court to declare the law of the case as follows:

Defendants' Mo. to Declare the Law.

If Edward Jenner Smith in 1836 purchased of the United States & paid for the S. E. ¼ of sec. 36, town. 64, range 6, and if pl'ff at the time he located his agricultural college scrip on said S. E. ¼ had notice of said prior purchase of said land by said Smith, and if at the time of said location by pl'ff the equitable title of said Edward Jenner Smith had vested and was then in defendants, Lucretia Jungher & Sallie F. Johnson, wife of def't, H. Will Johnson, and if said Lucretia Jungher & Sallie F. Johnson and her said husband thereafter conveyed said land by deed of general warranty to McKee & others, and if def't Childers at — time this suit was instituted was in possession of said land or a part thereof as the tenant of such vendees of said Jungher & Johnson, and if upon the institution of this suit by pl'ff said vendees notified their said vendors, defendants Jungher & Johnson, that this suit had been instituted and requested said vendors to defend the same, and if said defendants, Lucretia Jungher & Sallie F. Johnson & H. Will Johnson, her husband, in pursuance of said notice & request, applied to be made & were made parties defendants herein, then and in that case said defend-
ants as warrantors of said land to their said vendees have
195 such an interest in the title of said land as will authorize them in this action to ask a decree divesting the legal title of pl'ff and vesting it in these defendants or their said vendees, and the relief by them asked in their answer should be given.

Which said declaration of law the court refused to give and overruled; to which action and judgment of the court in refusing & overruling said declaration of law defendants then and there at the time excepted.

Thereupon the court on its own motion declared the law of the case to be as follows:

Declaration of Law.

1st. That the patent of the United States to plaintiff, read in evidence, vested in plaintiff, *prima facie*, the complete, legal, and equitable title to the southeast quarter of section 36, township 64, range 6, and the plaintiff is entitled to recover in this action, by virtue of said patent, said tract or so much thereof as may be in the possession of the defendant Childers at the time this action was instituted, unless it appears from the evidence that Edward Jenner Smith, under whom the defendant landlord and his grantors claim, did in fact purchase said southeast quarter from the United States in 1836 and did in fact pay for said tract, and unless it further appears that plaintiff, at the time he purchased said tract and accepted his patent therefor, had notice of the prior sale of said tract to said Edward Jenner Smith.

2d. If it appears from the evidence that in 1836 Edward Jenner Smith did in fact purchase from the United States the tract in controversy and pay the purchase price therefor, and if it further appears that plaintiff, at the time he purchased said tract and paid on it, in 1871, had notice of such prior purchase by said Smith, and if it further appears that the defendant Childers was in possession of a part of said tract at the time this suit was instituted as tenant of Samuel and John McKee, who claimed to be owners under said Edward Jenner Smith by virtue of the deeds and will read in evidence, and was not in possession of the balance of said tract, such facts constitute a good, equitable defense to plaintiff's action.

3d. Although it may appear that Edward Jenner Smith did, in 1836, purchase the tract in controversy, to wit, southeast quarter of section 36, township 64, range 6, of the United States, and pay the purchase price, and although it may further appear that plaintiff purchased said tract and accepted the patent therefor with notice
196 of such prior purchase by said Smith, and although it may further appear that at the time plaintiff purchased and accepted the patent the equitable title of said Edward Jenner Smith by operation of his deed to John D. Smith, and the will of John D. Smith, and the deed of Smith and Haslett, trustees, to Mary C. Buck, and the deed of Mary C. Buck to Theodore Jungherr, and the operation of the statute of descents had vested and was in defendants, Mary Johnstone and Lucretia Jungherr, the daughter and widow of said Theodore Jungher, yet if it further appear that before the institution of this action said defendants, Mary Johnston and Lucretia Junger, had by their deed conveyed to Buell and Fallon 35 acres of said tract and to Samuel and John McKee, the landlords of the defendant Childers, the remainder of said tract, the defendants, Johnson and Jungherr, are not, by virtue of their relation as grantors to said Buell and Fallon and Samuel and John McKee, entitled to any relief on the counter-claim or cross-petition.

Judgment.

To the action & judgment of the court in giving, on its own motion, declarations of law numbered 1 & 2 plaintiff at the time excepted.

To the action & judgment of the court in giving, on its own motion, declaration of law numbered 3 the defendants at the time excepted.

Thereupon the court found a verdict against plaintiff & rendered its judgment against plaintiff on the issues made upon his petition in the cause and dismissing the cross-action of defendants; and within three days thereafter, to wit, on the 16th day of November, 1877, plaintiff filed his motion for a new trial herein as follows:

Mo. to Set Aside Verdict.

In the Circuit Court of Marion Co., Mo. July Term, 1877.

ALBERT C. WIDDICOMBE, Plaintiff,

against

OLIVER CHILDERS *et al.*, Defendants.

Now comes said plaintiff and moves the court to set aside
197 the verdict in said cause and grant him a new trial therein for the following reasons:

First. Because the verdict is against the evidence in the case.

Second. Because the court admitted incompetent, irrelevent, and illegal evidence.

Third. Because it rejected legal & competent evidence.

Fourth. Because the verdict is against the preponderence and weight of evidence.

Fifth. Because the verdict is against the law.

Sixth. Because the verdict is against the law and the evidence.

Seventh. Because the verdict is in favor of defendants, whereas it should have been in favor of plaintiff.

THOS. L. ANDERSON,
Att'y for Plaintiff.

Filed Nov. 16, 1877.

JOS. H. DONELY, *Clerk.*

Which said motion the court thereafter, on 16th day of November, 1877, overruled; to which action & judgment of the court in overruling said motion for a new trial plaintiff then & there at the time excepted, and within three days after the rendering of said judgment by the court, to wit, on the 16th day of November, 1887, defendants filed their motion for a rehearing as follows:

198 *Mo. to Set Aside Judgm't.*

In the Circuit Court, Marion Co., Mo. Adjourned July Term, 1877.

ALBERT C. WIDDICOMBE, Pl'ff,

vs.

OLIVER P. CHILDRESS, LUCRETIA JUNGER, SALLIE F. JOHNSON, and H. WILL JOHNSON, Defendants.

Now comes defendants, Lucretia Junger, Sallie F. Johnson, and H. Will Johnson, and move the court to set aside the order and judgment of the court dismissing the cross-bill in their answer set out herein and to give them a new hearing thereon and to make a decree granting the relief prayed for in their answer, and they assign the following reason for their motion:

Because under the evidence in the case the relief prayed for should have been granted.

Because upon the facts by the court found the relief prayed for by these defendants should have been granted.

Because the court committed error in dismissing defendants' cross-action.

JAMES HAGERMAN &
ANDERSON & BOULWARE,
Defendants' Att'ys.

Filed November 16, 1877.

J. H. DONLEY, *Clerk.*

Which said motion the court overruled; to which action and judgment of the court in overruling said motion for a rehearing defendants *defendants* then & there at the time excepted.

199 And plaintiff now here presents this his bill of exceptions herein, and prays the court that the same be allowed, signed, sealed, and made a part of the record of this cause, which is accordingly done now in open court during the adjourned July term, 1877, thereof.

Witness my hand & seal this the 16th day of November, 1877.

JOHN T. REDD, *Judge.* [SEAL.]

STATE OF MISSOURI, } ss:
County of Marion, }

I, Joseph H. Donely, clerk of the circuit court in and for said county of Marion, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record & proceedings in the cause of Albert C. Widdicombe, plaintiff, against Oliver P. Childers, Lucretia Jungher, Sallie F. Johnston, & H. Will Johnston, her husband, as fully as the same remains of record in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at office, in the city of Palmyra, this 20th day of July, A. D. 1878.

[SEAL.] JOSEPH H. DONLEY, *Clerk.*

200 And afterwards, to wit, on the 2nd day of May, A. D. 1878, the following further proceedings were had in said cause, to wit:

Proceedings in the Supreme Court.

A. C. WIDDICOMBE, P. E., *vs.* O. P. CHILDRES *et al.*, D. E.

Error to Marion circuit court.

Now, at this day, comes the said plaintiff in error in his proper person and files a motion for a rule on the clerk of the Marion circuit court to show cause why he has not transmitted to this court a transcript of the record and proceedings of said Marion county circuit court in this cause, in compliance with the commands of a writ of error issued in this cause at the instance of said plaintiff in error on the 21st day of November, 1877.

Which said motion is in words and figures as follows, to wit:

In the Supreme Court of the State of Missouri. April Term, 1878.

A. C. WIDDICOMBE, Plaintiff in Error,

against

OLIVER P. CHILDRESS, LUCRETIA JUNGHER, *et al.*, Defendants in Error.

From the Marion circuit court, July Term, 1877.

Plaintiff in the above-entitled cause moves the court for an order on the clerk of the circuit court of Marion county, Missouri, to show cause why he has not transmitted to the clerk of this court a transcript of the proceedings in said cause, in compliance with the writ issued by the clerk of this court, dated November 21, 1877, at the request of plaintiff.

A. C. WIDDICOMBE, *Plaintiff.*

THOS. L. ANDERSON,
GIVENS & McKEE,
His Att'ys.

201 And afterwards, to wit, on the 27th day of June, the following further proceedings were had in said cause, to wit:

A. C. WIDDICOMBE, P. E.,

vs.

O. P. CHILDRESS *et al.*, D. E.

Error to Marion county circuit court.

Now, at this day, the court, having fully considered the motion of said plaintiff in error for a rule on the clerk of the said circuit court to show cause why he has not returned the writ of error issued in this cause, do order that the same be sustained and that a rule issue as prayed for by said plaintiff in error, returnable on the first day of the next term of this court.

And afterwards, to wit, on the 15th day of March, 1879, the following further proceedings were had in said cause, to wit:

ALBERT C. WIDDICOMBE, Plaintiff in Error,

vs.

O. P. CHILDRESS *et al.*, Def'ts in Error.

Error to Marion county circuit court.

Now, at this day, comes the said plaintiff in error, by his attorney, and files his motion for an order that the writ of error herein operate as a stay of proceedings.

Which said motion is in words and figures as follows, to wit:

A. C. WIDDICOMBE, Plaintiff in Error,

against

OLIVER CHILDRESS, LUCRETIA JUNGHER, S. F. & H. W. JOHNSON, Defendants in Error.

Plaintiff in error states that at the November term, 1877,
202 of the Marion county circuit court a judgment was rendered against him in the above-entitled cause in ejectment, and that a writ of error is now pending in this court from the judgment of said circuit court; that recently an execution from the circuit clerk of Marion county has issued, directed to the sheriff of Bates county, Missouri, against the property of this plaintiff, and he makes his motion in this court that his bond, with two good and sufficient sureties, be accepted by this court in the above-entitled cause, and that a proper order be made accordingly in the premises as by statute in such cases made and provided.

A. C. WIDDICOMBE,
Plaintiff in Error.

And afterwards, to wit, on the 17th day of March, 1879, the following further proceedings were had in said cause, to wit:

ALBERT C. WIDDICOMBE, Plaintiff in Error,

vs.

OLIVER P. CHILDRES, LUCRETIA JUNGHER, SALLIE F. JOHNSON, and H. WILL JOHNSON, Her Husband, Defendants in Error.

Error to Marion county circuit court.

Now, at this day, it appearing to the satisfaction of the court, upon an inspection of the record of the Marion county cir. court in the case of Albert C. Widdicombe, pl'ff in error, *vs.* Oliver P. Childres *et al.*, defendants in error, that there is error therein, and that the said A. C. Widdicombe, pl'ff in error, as principal, and F. W. Ludwig and W. W. Talioferro, as sureties, have entered into a recognizance to the said Oliver P. Childres *et al.*, the def'ts in error, as required by section 15 of article 13 of chapter 110 of Wagner's Missouri Statutes, the same being now approved by this court, it is ordered by the court that the writ of error issued in this cause on the 21st

day of November, 1877, out of this court stay all further proceedings on the judgment of said Marion county circuit court in
203 this cause until this cause can be heard and passed upon by this court.

And afterwards, to wit, on the 22nd day of April, 1881, the following further proceedings were had in said cause, to wit:

ALBERT C. WIDDICOMBE, P. E., *vs.* O. P. CHILDRES *et al.*, D. E.

Error to Marion — circuit court.

Come now the parties aforesaid, by their respective attorneys, and file a stipulation to continue this cause until next term:
Ordered, That this cause be continued until next term.

Which said stipulation is in words & figures as follows, to wit:

Stipulation.

In the Supreme Court of Missouri.

ALBERT C. WIDDICOMBE, Plaintiff in Error,
vs.
O. P. CHILDRES *et al.*

In the above-entitled cause it is agreed between the counsel for the respective parties that the same may be continued until the next term of this court.

It is further agreed that the counsel for plaintiff in error will serve a copy of brief and abstract of record on James Hagerman, counsel for def'ts in error, thirty days before the beginning of the next term of this court.

Boonville, Missouri, April 20, 1881.

A. C. WIDDICOMBE,
Pl'ff in Error.
JAMES HAGERMAN,
Att'y for Def'ts in Error or Appellees.

And afterwards, to wit, on the 18th day of October, 1881, the following assignment of errors was filed in said cause, to wit:

204 In Supreme Court of the State of Missouri. October Term, 1881.

And now comes the said A. C. Widdicombe and says that in the record and proceedings of the court below in the above-entitled cause there is manifest error, and for error said A. C. Widdicombe assigns the following, to wit:

1. That said court admitted improper and illegal testimony offered by defendant.
2. That said court rejected proper and legal testimony offered by plaintiff.
3. That the court gave improper and illegal instructions.

4. That the court refused to give proper and legal instructions offered by plaintiff.
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the defendant, when it should have been rendered for the plaintiff.
10. That said court overruled the motion for a new trial made by plaintiff.

A. C. WIDDICOMBE,
Pl'ff in Error.

And now come the defendants and appellees and for joinder in error say there is no error in the record and proceedings of said court below in said cause as assigned by said plaintiff.

Oct. 19th, 1881.

JAMES HAGERMAN,
Att'y for Defendants and Appellees.

205 And afterwards, to wit, on the 20th day of October, 1881, the following further proceedings were had in said cause, to wit:

ALBERT C. WIDDICOMBE, P. E., *vs.* O. G. CHILDRESS *et al.*, D. E.

Error to Marion county circuit court.

Now, at this day, come the said defendants in error, by attorneys, and after argument submit this cause to the court; whereupon comes the said plaintiff in error, by attorneys, and submits the same to the court on briefs; ten days to pl'ff in error to file supplemental briefs; copy to be served on the defendants in error.

And afterwards, to wit, on the 4th day of February, 1884, the following further proceedings were had in said cause, to wit:

ALBERT C. WIDDICOMBE, Plaintiff in Error,
vs.
OLIVER P. CHILDRESS, LUCRETIA JUNGHER, SALLIE F. JOHNSTON, and H. WILL JOHNSTON, Her Husband, Defendants in Error.

Error to Marion county circuit court.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid in form aforesaid by the said Marion county circuit court rendered be reversed, annulled, and for naught held and esteemed; and this court, now proceeding to render such judgment herein as should have been rendered by the said Marion county circuit court, doth consider and adjudge that the plaintiff in error be declared a trustee holding the property in controversy, viz., the

southwest quarter of section thirty-six (36), township sixty-four (64),
range six (6) west, for said defendants in error or those claim-
206 ing under them, and that the title to said property held by
the said plaintiff in error be divested out of him and vested
in the said *plaintiff* in error.

And it is further considered and adjudged by the court that the said defendants in error recover against the said plaintiff in error their costs and charges herein expended, and have therefor execution.

Opinion filed.

Which said opinion is in words and figures as follows, to wit:

207 *Opinion of the Court.*

In the Supreme Court of Missouri. October Term, 1883.

ALBERT C. WIDDICOMBE, P. E.,

vs.

OLIVER P. CHILDERS, LUCRETIA JUNGHERR, SALLIE F. JOHNSTON, and H. WILL JOHNSTON, Her Husband, D. E.

This is an action of ejectment for the southeast quarter of section 36, township 64, range 6 W., and was originally against Oliver P. Childers. It was instituted in the circuit court of Clarke county on the 25 day of August, 1874. The petition is in the usual form; the answer of the defendant Childers a general denial. The cause was sent by change of venue to the Marion circuit court. On the third day of March, 1876, Lucretia Jungher, Sallie F. Johnston, and H. Will Johnston were, upon their own motion and against the plaintiff's objection, made parties defendant, and on the 6th day of March, 1877, filed their separate amended answer upon which the cause was tried. This answer denied that the defendant Childers was in possession of any portion of the land sued for except $14\frac{82}{100}$ acres, being that part of the tract west of Fox slough enclosed by a fence. The answer then set up the statute of limitations, and for an equitable defense alleged that the defendant, Lucretian Jungher, was the widow and Sallie F. Johnston the only heir-at-law of Theodore Jungher, and that H. Will Johnston was the husband of said Sallie F. Johnston; that in 1836 Edward Jenner Smith intended to enter and applied to enter and did enter the land sued for, but that the application was, by mistake of the register who filled the same, made for the southwest quarter instead of the southeast quarter; that the southwest quarter had been previously sold to one Robert D. Woodin, and was mistakenly inserted by said register in the application signed by said Smith instead of the southeast quarter, which was the tract actually entered and intended to be applied for and entered by said E. Jenner Smith; that the correct land was by the register noted upon the tract book and plat book which had since been wrongfully and fraudulently changed; that the said E. Jenner Smith took possession of and on the 6th of November, 1837, sold the southeast quarter to John D. Smith; that the executors of John D. Smith sold

the same in 1838 to Mary C. Buck, who, with her husband, sold to Theodore Jungher in 1857; that Jungher died leaving defendant, Lucretia Jungher, his widow, and Sallie F. Johnston, wife of H. Will Johnston, his only heir; that in 1870 these parties sold by warranty deed 35 acres of the said southeast quarter to E. P. Bull and John Fallon; that January 1st, 1873, they sold by like warranty deed the balance of 125 acres to John W. and Samuel McKee; that all of said conveyances were upon record in the office of the recorder of Clarke county; that the said McKees in 1874 verbally leased $14\frac{82}{100}$ acres in the south part of the southeast quarter west of Fox slough to defendant, O. P. Childers, who was in possession of that portion
208 of said land only; that the parties aforesaid, claiming under said E. Jenner Smith, have been in possession of the said southeast quarter under their respective deeds continuously since the entry of said land; that the plaintiff, with full notice of the facts and of the equities of said defendants and their grantors and grantees, and with knowledge of the said mistake and error, in fraud of their rights, entered said southeast quarter and procured a patent to be issued to himself therefor, and asked that he be declared to be a trustee for the defendants or those claiming under them, and the legal title be divested out of him and vested in the defendants, or those claiming under them, by deed of general warranty as aforesaid.

On the eighth day of November, 1877, plaintiff filed his replication denying specifically each allegation of the said answer, and expressly and positively denying all allegations of notice to him or fraud upon his part in entering said land.

The case was tried before the court without a jury on the 16th of November, 1877. The court found the issues for the defendants and entered a final judgment against the plaintiff, but refused to decree the title into defendants as prayed by them.

This finding and judgment of the court, *in extenso*, is as follows, to wit:

The court doth find the following facts:

That on the 8th day of November, 1834, one Robert Wooden entered at the land office at Palmyra the west one-half ($\frac{1}{2}$) of section thirty-six (36), township sixty-four (64), range six (6), and the west one-half ($\frac{1}{2}$) of the northeast quarter of said section, and on the 10th of April, 1839, a patent issued to said Wooden for said tracts.

That at the time of Wooden's entry the number of the entry of the west one-half of said section, to wit, No. 7417, was entered on each of the quarters composing said one-half section, viz., the northwest quarter and southwest quarter, and the number of his entry of the eighty-acre tract, viz., No. 7418, was entered on said tract on the plat of said section, and at the same time the fact of his entry was stated by the register in the tract book showing the description and quantity of the tracts, the date of the entry, and the name of the purchaser.

That afterwards, to wit, on the 6th day of July, 1836, one Edward Jenner Smith applied to the register to enter or purchase the remainder of said section thirty-six, to wit, the southeast quarter of

said section and the east one-half of northeast quarter; that at the date of Smith's application Wm. Wright was still register, and the plat book and tract book both showed that the said southeast quarter and east one-half of northeast quarter of said section were vacant, and that the west one-half of said section and west one-half of the northeast quarter had been sold in 1834 to Robert Wooden; that Wm. Wright agreed to sell and did sell to said Edward Jenner Smith said southeast quarter and the east one-half of the northeast quarter of said section, and that Wm. Wright, the register, at
209 the instance of said Smith, filled up a blank application in furtherance of said sale, but in so doing, by mistake in describing said southeast quarter, substituted the letter W instead of the letter E, by reason of which said mistake said application described said quarter as the southwest quarter instead of the southeast quarter of said section 36.

That said Wm. Wright, on the return to him by said Smith of said application, with the certificate of the receiver indorsed thereon, showing the payment to said receiver of the purchase price of a quarter-section and eighty acres, and failing to discover the mistake in the description in said application, did, on the day said sale was made, enter the fact of said sale on his tract book by the correct description, viz., the southeast quarter and the east one-half of the northeast quarter of said section 36, 64, 6 (immediately under the entry of the sale to Wooden), giving in his said entry the date of said sale and the name of the purchaser, viz., said Edward J. Smith; and did also at the same time enter the number of said entries on both said tracts on his plat book, viz., on the southeast quarter No. 14513, and the east one-half of the northeast quarter No. 14513, and that said entries made by William Wright, the register, at the time of the sale remained on said plat of said section and on said tract book unchanged as late as 1858, a period of twenty-two years.

The court further finds that at some time between 1858 and the spring of 1871 said entries were changed as follows, viz: In the entry on the tract book of the sale of the southeast quarter to Edward J. Smith, dated July 6th, 1836, the letter E in the description of the quarter-section was erased and the letter W substituted, so as to make said description read after said erasure and substitution the southwest quarter instead of the southeast quarter, thus making it appear that the southwest quarter had been twice sold—once in 1834 to Robert Wooden, and again in 1836 to Edward J. Smith—and at the same time the number of Smith's entry indorsed at the time by the register on the southeast quarter on the plat of said section was erased and the same number indorsed on the southwest quarter, immediately under the number of Wooden's entry on said quarter; that said erasure and alterations were not made by William Wright because, first, they are not in his handwriting; second, they were made after 1858, and consequently after his death. By whom they were made the evidence does not show. It discloses the fact that plaintiff had an opportunity

to have made them, and availed himself of them after
210 they were made. After said erasures and alterations were made, and at the time of plaintiff's entry, May 10th, 1871, the inspection of the plat, the number of Smith's entry on the southeast quarter having been erased and entered on the southwest quarter under the number of Wooden's entry of that quarter, the plat would show the southeast quarter vacant, and on inspection of the tract book it would show Wooden's entry in 1834 of the southwest quarter and Smith's entry in 1836 of southwest quarter and the southeast quarter consequently vacant or subject to sale; said plat and tract book would, however, further show that there had been an erasure on the portion of the paper occupied by the letter W in the description southwest quarter, and that said letter W was in a different handwriting from the remainder of the entry and apparently a much later date, and the inquiry would naturally suggest itself to plaintiff's mind what letter had been erased and it would occur to him it could have been no other than the letter E; and, if so, then the original entry of sale must have been the southeast quarter. Looking from this to the plat of the section in the plat book he would there see that an entry had been made on the plat of the southeast quarter and erased, and that the number corresponding to the tract, originally the southeast quarter on tract book, was entered on the southwest quarter, immediately under No. 7417, corresponding to Wooden's entry. With these facts before his eyes it would suggest itself to him that one of two states of fact must exist, either, first, that the register had sold the southwest quarter twice—once to Wooden and again to Smith, and had by mistake entered on his tract book and plat the sale to Smith of the southeast quarter instead of the southwest quarter—or he had, in fact, sold the southeast quarter to Smith and entered the memorandum of sale on his tract book and plat correctly, but made the mistake in the application, and that the original entry had been erased and altered contrary to the facts. These facts, in connection with the other circumstances proved, were sufficient to have put him, as a conscientious and prudent man, on inquiry, and if he had gone to the locality of the land he would have learned that at all times since the entry in 1836 Smith and those under him had claimed to own the southeast
quarter and had never set up any claim to the southwest
211 quarter, which was claimed alone by Wooden. Under this state of facts the court finds that the equitable title at the time of the entry by plaintiff, viz., May 10, 1871, and at the time the patent issued to plaintiff, December 15, 1871, was in the defendant, Sally F. Johnstone, sole heir-at-law of Theodore Iungherr, deceased, and the defendant, Lucretia Iungherr, widow of said Theodore, by operation of the muniments of title read in evidence by defendants, viz., the deed of E. Jenner Smith to John Smith; the will of John Smith; the deed of Smith & Haslet, executors of John Smith, to Mary C. Buck, and the deed of Mary C. Buck to Theodore Iungherr; and the plaintiff, in making said entry and accepting said patents, with notice of such facts and circumstances as were sufficient to put him upon inquiry to such equitable title, took said

patent, with notice of such equity then in defendants, and held the same in trust for defendants, and the defendant Childers being in possession of fourteen acres of said tract as tenant of McKee & McKee, grantees of defendants Johnson and Iungherr; that consequently said facts are good, equitable defense to plaintiff's action, and the verdict on the plaintiff's action is for the defendant Childers. It further appearing that the defendants, Sally F. Johnstone and Lucretia Iungherr, by their deed dated May 5, 1873, conveyed all their rights, title, and interest (to wit, their equitable title) to Samuel McKee, John W. McKee, E. Pratt Buell, and John Fallon in and to 125 acres of said southeast quarter lying west of Fox slough; on the 18th of June, 1875, conveyed by deed their title to the remainder of said tract, lying east of said Fox slough, to Buell and Fallon, viz., thirty-five acres, and that at the institution of this suit said defendants Johnstone and Iungher had no title or interest in said southeast quarter, having previously conveyed the same to said Samuel and John McKee and said Buell and Fallon, none of whom are parties to this action, and the court being of opinion that no affirmative relief can be given in this action on the cross-petition to defendants Johnstone and Iungherr, because, not being the owners of the equitable title, they are not entitled to a decree vesting in them the legal title, nor can relief be given to said McKee, Buell, and Fallon, the present owners of the equitable fee, because they are not parties to this suit—

It is therefore considered that the plaintiff take nothing by his writ in this cause and that defendants go hence without day, and that defendants have and recover of plaintiff their costs in this suit expended, and that the cross-action by defendants Johnstone and Iungherr be dismissed without prejudice to any independent action they may hereafter institute against plaintiff and the vendees of defendants for the relief sought in said cross-action.

212 From this finding and judgment the plaintiff in due form and manner has brought the case here by writ of error, and this finding and judgment is here assigned for error.

The separate answer of the defendants, Lucretia Jungherr, Sallie F. Johnston, & H. Will Johnston, her husband, upon which the case was tried, as we have seen, among other things, set up two defences: First, the statute of limitations; second, an equitable defence to the effect that one E. Jenner Smith, under whom defendants claim, had applied to enter and in point of fact had entered and paid for the land in question, but that by mistake in his written application therefor the S. W. one-fourth of said section instead of the S. E. one-fourth was inadvertently inserted therein, and that plaintiff afterwards, with notice thereof, wrongfully entered the same and procured a patent therefor in fraud of their rights in the premises, and thereupon asked the court that the plaintiff be declared a trustee for said defendants or those claiming under them, and that the legal title thus acquired and held be divested out of plaintiff and vested in these defendants or those claiming under them by virtue of the warranty deeds hereinbefore referred to and specified. As to the statute of limitations set up in the answer, it is

sufficient to say, first, that the evidence shows no actual possession of the premises as is sufficient to support said plea; second, if it did, under the ruling in the case of Gibson *vs.* Chouteau *et al.*, 50 Mo. 85, and other cases following it it would not avail them in this case, as the legal title had not passed from the Gen'l Gov. a sufficient length of time to enable that defence to attach or become operative. The only remaining and real question in the case is as to sufficiency of the facts in evidence to support the findings and judgment in question; and, if so, what modification of the judgment, if any, the
213 circuit court ought to have rendered upon the facts so found and in evidence in the cause.

It is contended for the plaintiff that the evidence does not support the findings and judgment, while the defendants insist that it does, and also claim that the circuit court should have proceeded to grant the affirmative relief demanded, and divest and reinvest the legal title, as prayed for in their answer, and they now ask this court to render such judgment or decree, as the circuit court should have done.

After a careful and patient examination of the record we are satisfied that the findings of the circuit court are fully supported by the evidence in the cause, and that upon the whole case the law is with the defendants. The material and controlling questions in the case are but two: First. Was there a mistake in the entry of said Smith, and, subsidiary to this, in what did that mistake consist; did it happen, as charged, in filling up the blank or written application therefor with a wrong number or letter, or did it occur in the "notations" of said entry as made by the register at the time upon the plat and tract books of said land office? Second. If such a mistake was in fact made and occurred, as claimed, in said written application and not in the notations thereof upon the books of said office, did the plaintiff, at the time of his entry and the date of his patent, have knowledge thereof, or had he notice of such facts and circumstances as should have put a prudent and conscientious man upon enquiry and would have led to such knowledge if enquiry had been made. If there was such mistake, of which there can be no doubt, and if the plaintiff had such knowledge, of which there can be just as little, then the law is clear that the plaintiff is chargeable with knowledge of such prior entry, and in such event his subsequent entry, with such notice, was a fraud upon such prior entry and
214 those claiming thereunder, and he will be held to be a trustee for them and compelled to convey the legal title thus acquired and held to the parties thus defrauded or to those claiming under them by deeds of general warranty. Story's Equity, section 395, and authorities cited.

It is conceded by the defendants that the application and patent, as made and issued, in the absence of proof to the contrary, are presumed to be correct; not only so, but they also conclude that the contrary cannot be made to appear, except upon the clearest and most satisfactory proof; but they claim, and we think correctly, that they are not absolutely conclusive, and may be rebutted if the facts and circumstances in evidence are strong enough to satisfy the

mind and conscience of the chancellor. It was upon this theory and to this end that all their testimony was directed. They insist that the mistake was not only made in the original application, but that it was inadvertently reproduced and continued in the register's certificate, the monthly and other reports of the local to the General Land Office, and finally consummated in the patent itself, and never discovered by the defendants or those under whom they claim until this suit was brought.

The evidence of the plaintiff, consisting mainly, as it does, of those papers, certificates, reports, and documents, is in no just sense in rebuttal of defendants' testimony, designed and tending to show, as it does, such mistake. These documents are admitted to be as claimed by plaintiff, but it is charged that they so appear only by reason of the mistake alleged and proved by the defendants. This testimony of plaintiff, therefore, only tended to prove what defendants had already alleged as the foundation of their equitable defence, and of itself is no answer to the case made by the defendants' evidence.

The laws of Congress and the regulations of the Land De-
215 partment recognize this right and provide for correcting such mistake if discovered and timely application is made to the Land Department, while the legal title still remains in the Gen'l Government. Rev. Statutes of U. S., 2nd ed., p. 434, sections 2369 and 2372, inclusive; Pub. Land Laws, Instructions and Opinions, part 2nd, p. 451 and 457.

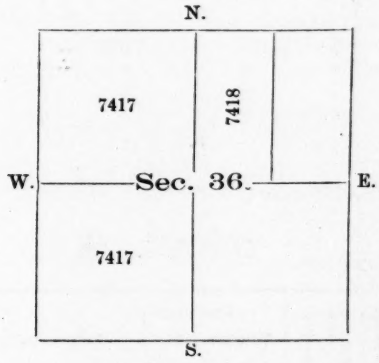
After the title had passed from the Gov. to individuals and the question has become one of private right between citizens and litigation ensues, then the jurisdiction of such questions is omitted to the courts of the country, whose common-law jurisdiction enables them to inquire into and determine the case as equity and good conscience may require. Johnson *vs.* Towsley, 13 Wall., 72; Minnesota *vs.* Bachelder, 1 Wall., 109; Silver *vs.* Ladd, 7 Wall., 219; Stark *vs.* Star, 6 Wall., 402; and Carman *vs.* Johnson, 29 Mo., 84; and same case, 20 Mo., 108.

In addition to the special findings of the circuit court the record discloses other facts and circumstances tending to the same result. It appeared that, when application was made to enter land at this and other like offices, the usual routine was for the register to open, exhibit, and examine the plat and tract books of said office, which indicated what lands were vacant and subject to entry and what had already been sold; that upon such examination it was customary for the applicant to point out or indicate upon the plat book the land he desired to enter; whereupon it was usual for the register to fill up a blank or written application with the numbers or description of the land thus selected, which the applicant signed, and upon its presentation to the receiver and the payment of the purchase-money the receiver gave the purchaser a certificate to that effect, and upon its production to the register he noted upon said plat book the number of said entry by writing it upon the face of the tract so entered as the same appeared on said plat book or survey, and
216 also by stating in writing the fact of said entry upon the tract

book, giving descriptions or numbers of the land, date of entry, and residence of the party so making said entry.

It also appeared that the monthly and other returns from the local to the General Land Office were frequently, if not generally, made up from an inspection of the written application above, without comparing them with the "notations" of said entry as made at the time by the register on the books of the office, as was the more formal mode. It also appeared that at the date of Smith's application and entry, in 1836, the tract and plat books in said land office presented this appearance:

Plat Book.

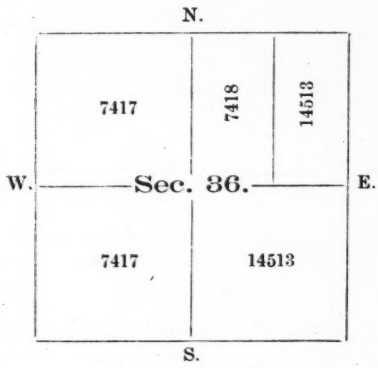


Tract-Book.

	Section.	Township.	Range.	Quantity.	To whom sold.	Residence.	When sold.
				Acres.			
	36	64	6	640			
West half.....	.....	.....	.....	320	Robert Wooden...	Lewis county, Mo.	November 8, 1834.
West ½ N. E. ¼	.....	.....	.....	80	" "	" "	" "

After his said entry said books offered this appearance:

217 *Plat Book.*



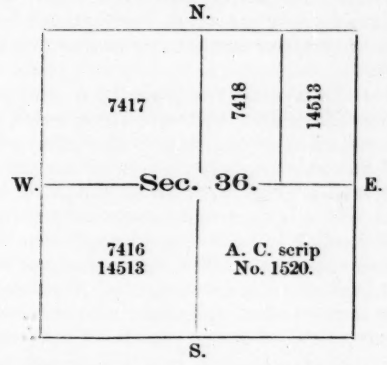
Tract Book.

	Section.	Township.	Range.	Quantity.	To whom sold.	Residence.	When sold.
				Acres.			
	36	64	6	640			
West half.....	.....	.....	.....	320	Robert Wooden...	Lewis county, Mo....	November 8, 1834.
West ½ N. E. ¼...	.....	.....	.....	80	" " ...	" " ...	" "
E. ½ N. E. & S. E...				240	E. Jenner Smith..	" " ...	July 6, 1836.

And, after the erasures, alterations, and mutilations of the records spoken of, by which the No. 14513 on said plat book had been erased from the S. E. one-fourth of said section and transferred to the S. W. one-fourth thereof, and by which also the letter "E" in Smith entry on the said tract book had been erased and the letter "W" substituted therefor, and also after plaintiff's said entry thereof, the said books gave this appearance, except that this diagram don't exhibit the evidence of said erasures, alteration, and substitution still apparent on the original books:

EXHIBIT "A."—Gott's deposition.

Plat Book.



218 EXHIBIT "B."—Gott's deposition.

Tract Book.

	Section.	Township.	Range.	Quantity.	To whom sold.	Residence.	When sold.
	36	64	6	*Acres.* 640			
West half	.....	.....	.....	320	Robert Wooden	Lewis county, Mo...	November 8, 1834.
West ½ N. E. ¼	.....	.....	.....	80	" "	" " " ...	" " "
E ½ N. E. & S. W.	.....	.....	....	240	E. Jenner Smith.....	" " " ...	July 6, 1836.
S. E. ¼	.....	...	.....	160	A. C. Widdicombe...	A. C. scrip, Ky., No. 1520	May 10, 1871.

Indeed, the plaintiff himself, speaking of the appearance of these books and of what he saw, at and prior to his said entry, on his cross-examination, testified as follows, to wit:

"I discovered the southeast quarter 36, 64, 6 W., was vacant while employed in making an examination of the records to purchase for a party in Scotland county, an 80-acre tract where there were three applicants at the same time for the same piece of land, one of whom was the sheriff of Scotland county. There had been a correction, alteration, or erasure, call it as you please, on the plat and tract books in the register's office, in section 36, township 64, range 6 west, and I saw it before I made the entry. The plat book, whereon the numbers of entries are posted, in section 36, and on the southeast quarter of said section there is a perceptible erasure. On the tract

book the letter "W" in the Smith entry appears to have been made with a heavy stroke of the pen, and has a much heavier and darker appearance than the letter "S" preceding it, and has the appearance of having been changed from some other letter, and the letter "E" is the only letter over which the letter "W" could have been written so as to have formed a correct description of any other entry, either in that or any other section, or in the description of lands similarly situated."

It further appeared also that the plaintiff at and prior to the time of his said entry was familiar with the routine, rules, regulations, and customs of said land office pertaining to the entry of lands; that he was frequently at the office; spent much of his time in examining its records, books, and papers, with all of which he had great familiarity, and that he did a large practice as a lawyer in contested cases of entry before said office. To a casual applicant, unfamiliar with the routine and records of said office, such erasures and alterations, if noticed at all, might not have suggested that said land was not subject to entry or that another had any claim thereto, but not so with this plaintiff, whose practiced eye, experienced judgment, and familiar knowledge of such things, we are constrained to believe,
219 would have enabled him to comprehend, at a glance, not only that a mistake had been made in said entry, but also to determine in what that mistake consisted; from what he testified he saw on the face of the books, from his knowledge of the custom of transacting business in said office, and his familiarity with its records he could scarcely fail to know that the mistake must have been in the application for the entry and not in the "notations" thereof as made upon the books of said office, and also that said erasures and alterations, plainly visible upon the face of said books, by whomsoever made, caused them to appear, in their mutilated and altered condition, contrary to the actual facts of the transaction, as they must have occurred and been recorded by the proper officer at the time. As an intelligent lawyer and an adept in such matters he must have known that the register had no right and would not knowingly permit Smith to enter a tract already sold to another, and that Smith would not intentionally enter or apply to enter land which he must have seen was already purchased by another.

To say the least of it, they were such facts and circumstances as should have put him on enquiry, and would have led, if properly pursued, to a knowledge of such mistake and the claim of these defendants and those under whom they claimed, as well as of those claiming under them. This record discloses the further fact that, upon the institution of this suit against the tenant Childers, the parties to whom these defendants had sold the land, by deed of general warranty purporting to convey an indefeasible estate in fee-simple absolute, notified these defendants and required them to defend said action and protect their right in the premises, and that thereupon said defendants put in their answer and made the defense, and also asked the circuit court to grant them appropriate
220 affirmative relief and divest the plaintiff of the legal title and invest these defendants or those claiming under them by

such warranty deed with the same, &c. We have been cited to the cases of Sensendefer *vs.* Smith, 66 Mo., 80; Sensendefer *vs.* Neale, 66 Mo., 669, and Widdicombe *vs.* Mercer, 72 Mo., 588, as holding a doctrine contrary to the views here expressed. This we think to a great extent is a misapprehension of these cases. When carefully considered it will be found that these cases, especially the first, upon which the other two are based, recognize in direct terms the views here expressed. The other two cases also substantially do the same thing. The most that can fairly be said of these cases is that the evidence preserved in the records of these several cases was not sufficient, in the opinion of the court, to sustain the equitable defence set up in the answer or to support the finding of the court thereon. This was the only real point in judgment in all these cases, and any seeming conflict therein with the views here expressed, if any there be, will be found, upon a careful examination of the whole context, to be rather colorable than substantial. The leading case also, it will be seen, puts the decision in part, at least, on the fact that if the party had originally made such mistake by his subsequent conduct he had acquiesced in the same for many years, and was, therefore, estopped from asserting the same against a party subsequently purchasing the land. In any event these cases in many respects are unlike the case at bar. There the evidence was mostly, if not entirely, oral and given from memory 20 years or more after the occurrences to which they relate. Here it is supplied mainly by the original records themselves. There it was comparatively meager, whilst here it is abundant. If parties negotiating about a tract of land or town lot should go to the premises and upon inspection should agree touching the sale and purchase thereof and thereupon draw up and execute a deed of conveyance and by mistake insert
221 therein wrong numbers, would any one doubt that, upon satisfactory proof of the mistake, a court of equity would correct the same. Suppose instead of that they should go to a plat of the town or of the public lands and upon inspection thereof should select and bargain for a given one-fourth section of land or town lot and make a similar mistake in the deed of conveyance, would not the same result follow? This in substance is precisely what, the evidence shows, occurred in Smith entry of the tract of land in question. We are of opinion, therefore, that the special findings of the circuit court as to the mistake in question and plaintiff's knowledge of notice thereof are fully supported by the evidence in the cause, and that they constitute a good defence to plaintiff's action, and that the court did right so to find and declare. We are also of opinion that, under the facts and circumstances in evidence, the ends of justice would have been best promoted and preserved by granting to the defendants the affirmative relief asked for, especially, as under operation of section 3904, Rev., 79, the title so acquired would instantly inure to the benefit of those claiming under the defendants by deeds of general warranty, and thus save unnecessary litigation, expense, and delay; wherefore it is here ordered and adjudged by this court that the judgment of the circuit court be reversed, and that such judgment as it should have rendered,

as hereinbefore indicated, be, and the same is hereby, ordered and rendered, and that the same be entered up, in due form, accordingly.

Kritzer *vs.* Smith, 21 Mo., 302; Phillips *vs.* Stewart, 69 Mo., 149; Morgan *vs.* Chicago and A. R. R. Co., 76 Mo., 178, and section 3776, Rev., 79.

All concur.

R. D. RAY, *J.*

222 And afterwards, to wit, on the 14th day of February, A. D. 1884, there was filed an appeal bond in said cause, which is in the words and figures as follows, to wit:

223 Know all men by these presents that we, A. C. Widdicombe, as principal, and J. B. Kaiser, T. M. Rice, as sureties, are held and firmly bound unto Oliver P. Childers, Lucretia Jungher, Sallie F. Johnston, and H. Will Johnston, her husband, in the full and just sum of five hundred dollars, to be paid to the said Oliver P. Childers, Lucretia Jungher, Sallie F. Johnston, and H. Will Johnston, her husband; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirteenth day of February, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately, at the October team, A. D. 1883, of the supreme court of the State of Missouri, in a suit depending in said court between A. C. Widdicombe, plaintiff, and Oliver P. Childers, Lucretia Jungher, Sallie F. Johnston, and H. Will Johnston, her husband, defendants, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error to the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a Supreme Court of the United States to be held at Washington, D. C., on the second Monday of October next:

Now, the condition of the above obligation is such that if the said A. C. Widdicombe, plaintiff, shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

A. C. WIDDICOMBE. [SEAL.]
J. B. KAISER. [SEAL.]
T. M. RICE. [SEAL.]

Sealed and delivered in presence of—

—— ——.

224 UNITED STATES OF AMERICA, } *sct:*
District of ——, }

Before me, Henry W. Ewing, cl'k sup. c't of Mo., — A. C. Widdicombe, J. B. Kaiser, and T. M. Rice, to me well known, who, upon oath, state that they are worth over and above their indebtedness

the sum of 500 dollars, and that they own real property to that amount subject to execution in the State of Missouri.

A. C. WIDDICOMBE.

Subscribed and sworn to before me this 14th day of February, 1884.

HENRY W. EWING, *Clerk*,
By E. B. EWING, *D. C.*

STATE OF MISSOURI, *ss:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remain of record and on file in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office in the city of Jefferson, this 22d day of September, A. D. 1884.

[Seal of the Supreme Court of Missouri.]

HENRY W. EWING, *Clk.*
By E. B. EWING, *D. C.*

Endorsed on cover: Missouri supreme court. No. 89. Albert C. Widdicombe, plaintiff in error, *vs.* Oliver P. Childers, Lucretia Jungher, Sallie F. Johnston, and H. Will Johnston, her husband. Filed 11th October, 1884.

Supreme Court of the United States

OCTOBER TERM, 1897.

ALBERT C. WIDDICOMBE,
Plaintiff in Error,
v.
OLIVER P. CHILDERS and others,
Defendants in Error.

No. [illegible]

IN ERROR TO THE SUPREME COURT OF THE STATE OF [illegible]

Brief for Plaintiff in Error.

S. S. BURDETT,
Attorney for Plaintiff in Error.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND [illegible]
1897.

Supreme Court of the United States.

OCTOBER TERM, 1887.

ALBERT C. WIDDICOMBE,
PLAINTIFF IN ERROR,

v.

OLIVER P. CHILDERS AND OTHERS,
DEFENDANTS IN ERROR.

No. 89.

In Error to the Supreme Court of the State of Missouri.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action of ejectment brought by Widdicombe, the plaintiff in error here, in the circuit court of Clark county, Missouri, at its October term, 1874, against Oliver P. Childers, to recover the possession of the southeast quarter of section thirty-six, in township sixty-four, of range six, Missouri, under the patent, therefor, of the United State, issued to him, Widdicombe, on December 15, 1871.

The petition alleged that the plaintiff was, on the first day of January, 1872, entitled to the possession of the tract in controversy, and, whilst so entitled, the defendant, to wit,

on the first of March, 1872, entered into and upon such premises, and, thereafter, unlawfully withheld from the plaintiff the possession thereof. The prayer was for judgment for the recovery of the premises and for damages for unlawful detention (record p. 4).

At the April term, 1875, the defendant Childers filed his answer denying the several allegations of the petition (record, p. 6).

At the same term leave was taken by him to file an amended answer sixty days before the next term. He filed no such answer. At the said next term (October, 1875), by the agreement of parties, a judgment for possession and for costs was entered for the plaintiff, which judgment was at the same term by the court, on its own motion, set aside.

On the plaintiff's motion at that term a change of venue to the circuit court for Marion county was awarded (record, pp. 6, 7). At the February term, 1876, of the said Marion circuit court, Lucretia A. Jungher, Sallie F. Johnston, and H. Will. Johnston, her husband, were, on their motion, and against the plaintiff's objection, made parties defendant with leave to answer, and thereupon filed their separate answer (record, p. 9–14), to which the plaintiff demurred both as to the legal sufficiency of the facts stated in said answer, and as to the parties (record, p. 15), which being overruled, a replication to the answer was filed. At a subsequent term (February, 1877), the defendants, Lucretia A. Jungher, Sallie F. Johnston, and H. Will. Johnston, her husband, filed their *separate amended answer* in the nature of a cross action (record, p. 23–29), to which the plaintiff filed replication (record, p. 34–38). The pleadings on which the trial below proceeded, therefore, were: The original petition (record, p. 4), the answer of the defendant Childers, the said separate amended answer of Jungher *et al.*, and the replication thereto.

Said separate amended answer denies the allegations of the petition generally, but admits that Childers was at the institution of the suit, and still remains, in possession of $14\frac{82}{100}$ acres only of said southeast quarter of sec. 36. It alleges that the defendant Lucretia A. Jungher is the widow; that Sallie F. Johnston is the only heir at law of Theodore Jungher, deceased, and that the defendant, H. Will. Johnston, is her husband; that, prior to the institution of this suit, said Theodore Jungher died seized of the possession and title to the land described in the petition; that these defendants had conveyed 125 acres of the land, by deed of general warranty, to John W. and Samuel McKee, who took possession and leased said $14\frac{82}{100}$ acres to Childers; that said McKees, or those claiming under them, have notified these defendants to defend this suit as warrantors; the defence of the statute of limitations is also set up. *For an equitable answer*, it is alleged that on Nov. 8, 1834, one Robert Wooden applied for, entered, and paid for (at the proper U. S. land office), a tract of land which embraced the southwest quarter of sec. 36, township 64, range 6, Missouri; that afterwards, about July 6, 1836, one Edward Jenner Smith, being desirous to purchase the remaining tracts in said section 36, including the southeast quarter thereof, which was then subject to private entry, "intended to apply and did, in fact, apply to the register of the said office to purchase them for cash; that said Smith signed and presented an application, supposing and intending it to be for (among other tracts) the said southeast quarter; that the register wrote out the application, and in doing so "negligently made a mistake in this: Instead of describing therein the southeast quarter of said section 36, he wrote the words 'southwest ¼ section 36;'" but that the register made the proper entry upon his books of original entry, namely, the plat and tract book, showing that Smith had

entered the said *southeast* quarter; that subsequently, on Nov. 6, 1837, said Edward J. Smith conveyed said southeast quarter, and other lands, to his brother John D. Smith, who duly recorded his deed therefor in the proper county, took possession, paid taxes, and believed he owned the land; that by the will of said John D. Smith, and the duly recorded deeds of his devisees, the title to said southeast quarter passed (Sept., 1867) to Theodore Jungher, upon whose decease the defendants, his widow and heir, succeeded to the title; that they (June, 1870) sold 35 acres to E. Pratt Buell and John Fallon, and in January, 1873, sold the balance (125 acres) to John W. and Samuel McKee; that the McKees, in the year 1874, leased $14\frac{82}{100}$ of their part of the tract to the defendant O. P. Childers, who was in possession at the commencement of this suit, and that all the rest of the tract remained in possession of said McKees, and said Buell and Fallon, or those claiming under them; that about May, 1871, the plaintiff discovered the mistake in the written application of said Edward Jenner Smith; that he had full knowledge of the mistake, and of Wooden's previous purchase, and of the subsequent sales of the tract, and also of the possession and payment of taxes by others, and that, with full knowledge of all the facts and circumstances, the plaintiff, for the purpose of defrauding the defendants and those claiming under them, procured a patent to be issued to himself for the land; that in order to secure such patent he fraudulently erased, or changed, the original tract book and plat, or caused the same to be done; that whatever legal title plaintiff acquired by his patent was with knowledge of these rights and in fraud thereof, and that he must be held to hold the land under his said patent in trust for their use and benefit.

The prayer was that if the court should find that the plaintiff has the legal title to said land that it decree the

same to the defendants or to those claiming under them (record 23–29). There were other allegations in the separate amended answer, which, on motion, were struck out (record 29 and 32–34). There was a demurrer to the separate amended answer of Jungher and Johnston (record p. 32), which was overruled, as was also a motion by plaintiff to set aside the order making certain parties co-defendants (record, p. 17).

The replication put in issue the several allegations of the said separate amended answer (record 34–38).

At the trial it was shown that Widdicombe, the plaintiff, located the tract in question, at the proper local land office, on May 8, 1871, and received, on December 15, 1871, the patent of the United States therefor, which patent he duly put upon the records of the proper county on January 26, 1872 (record, p. 116); that before and at the date of his said location and patent, the land was wholly unoccupied and unenclosed (record, pp. 127 and 112).

It was also shown that on July 6, 1836, Edward Jenner Smith applied in writing to the register of the proper local land office to purchase certain lands, among others the *southwest* quarter of sec. 36, township 64, range 6, for which he agreed with the register to pay the lawful price. In that application no mention was made of the *southeast* quarter of said section 36. On the same day he paid the purchaae money to the receiver, who delivered to him a duplicate receipt reciting the sale of said *southwest* quarter of section 36, and, thereupon, the register entered the fact of the sale of said *southwest* quarter upon his register of cash entries (record, p. 46), and issued the usual patent certificate therefor. The patent of the United States was issued to Edward Jenner Smith August 30, 1838, conforming in all things to his said application, the receiver's receipt, and the patent certificate. It was delivered to John D. Smith, who was the

vendee of E. Jenner Smith, about 1839, on his surrender to the General Land Office of the said duplicate receipt (record, p. 124).

That E. Jenner Smith applied to enter, and did enter, the *southwest* quarter, and not the *southeast* quarter, was shown by the following official records: 1st. His application for the *southwest* quarter. 2d. The register of entries. 3d. The final certificate. 4th. The tract book. 5th. The plat book. 6th. The register of receipts issued by the receiver. 7th. The quarterly account current. 8th. The register's monthly report. 9th. The receiver's monthly report. 10th. The patent of the United States (deposition of Reiche, record, p. 73).

The integrity of these records is not questioned except in the following particulars. It is admitted that in the record of the sale to E. Jenner Smith, as made in the tract book, the letter "W" is written over an erasure, and that on the plat book there has been an erasure in the space or diagram representing the southeast quarter.

When Smith applied on July 6, 1836, to purchase the *southwest* quarter of section 36, the official record in the local office showed that it had, on November 8, 1834, been applied for and entered by one Robert Wooden.

The patent to Wooden was not executed until April 10, 1837.

It was shown in evidence that the purchaser's original application is the basis of all entries and postings, and that whenever inaccuracies, omissions, or clerical errors are found in any of the records they are corrected to conform with the original application (testimony of Reiche, record, pp. 73 and 74).

When an application to enter is made it is given a current number. Smith's application to enter the southwest quarter was numbered 14,513. The posting on the plat book con-

sists in writing, on the space representing the tract applied for, the number given to the application.

A copy of the plat book had once been furnished to Clark county, Missouri (within which the land in controversy lies), and there was evidence tending to show that this copy, which on inspection was found to be much torn and mutilated, once contained a figure or diagram of said southeast quarter, and that across it was written, not the numerals 14,513, but "E J. Smith" (record, pp. 95–101). There was proof that the plaintiff in error was well acquainted with the method of doing business in the local land office and with its records; that he carefully examined them before making his entry, and found the tract entered by him to be vacant public land.

A book made out in 1858 by the then register of the local land office for a private person, and certified to be correctly copied, which, among other disposals of public lands, reported the said southeast quarter as sold to Edward Jenner Smith, *July* 16, 1836, was also produced in evidence (record, pp. 99 and 100).

There was also evidence showing that taxes had been assessed against the said southeast quarter since 1847, and had been paid by those claiming under Smith.

The circuit court found from the evidence that in 1834, one Wooden entered the west half of section 36, township 64, range 6, and that at that time the number of his entry was entered on the plat book of said section on each of the quarters composing said half section, and that a patent for said west half issued to him in 1837; that in 1836 Edward Jenner Smith applied at the local office to enter or purchase the remaining lands in said section 36, but that through mistake his application was made to describe the southwest quarter instead of the southeast quarter; that, although said mistake was so made, said Smith intended to buy and did, in fact, buy the said southeast quarter; that when on May 10,

1871, the plaintiff Widdicombe made his entry, and also on December 15, 1871, when the patent of the United States issued to him, the equitable title to said southeast quarter of section 36 was in the defendants Johnston and Jungher, claiming through said Smith, and that the plaintiff in making his entry and accepting the patent of the United States for said southeast quarter had "notice of such facts and circumstances as were sufficient to put him upon inquiry as to such equitable title, took said patent with notice of such equity then in defendants, and held the same in trust for defendants."

November 16, 1879, the court rendered its judgment against the plaintiff by dismissing the writ, and against the defendants Johnston and Jungher by dismissing their cross-action (record p. 38–41).

On the same day the plaintiff and the defendants each filed separate motions for a new trial, which were overruled (record, 41).

A writ of error to reverse the judgment was sued out to the supreme court of the State of Missouri (record, p. 3).

The supreme court affirmed the finding of the court below, that said Edward Jenner Smith intended to buy and did buy the southeast quarter of section 36, and not the southwest quarter; and held, further, that the plaintiff, being an attorney well versed in the practice and procedure before the local land office in the sale of lands by the United States, was, by reason of that knowledge, specially charged with notice that a mistake had been made in the application of said Smith to enter the land; that "as an intelligent lawyer and adept in such matters he must have known that the register had no right and would not knowingly permit Smith to enter a tract already sold to another, and that Smith would not intentionally enter or apply to enter land which he must have seen was already purchased by another."

The cause was submitted to said supreme court, October 20, 1881 (record, p. 137). February 4, 1884, the judgment of the circuit court was annulled and reversed, and a judgment rendered declaring the plaintiff in error to be a trustee holding the property in controversy for the defendants in error or those claiming under them (record, p. 137).

To reverse this judgment the cause is brought to this court by writ of error.

Specification of Errors.

The plaintiff in error says that, in rendering judgment in this action, the supreme court of the State of Missouri erred:

I.

In holding that the equitable title to the land here in controversy passed to Edward Jenner Smith, under the proceedings had by him for an entry of public lands on July 6, 1836.

II.

In holding that the location of the tract in controversy by the plaintiff in error, and the issue to him of a patent therefor, did not vest in him, under the laws of the United States, the full legal and equitable title to said land.

III.

In holding that the patent of the United States issued to the plaintiff in error for said land vested the legal title thereto in him in trust for the defendants in error or those claiming under them.

IV.

In holding that there was, at the date of the entry of the plaintiff in error, any impediment against the acquisition

of a complete and valid title to the tract in question by any person applying therefor under the laws of the United States.

V.

In not holding that the patent of the United States, issued to the plaintiff in error pursuant to his entry, vested in him, under the laws of the United States, the full title, legal and equitable, to the land in said patent mentioned and described.

VI.

In holding that the plaintiff in error, in applying to make his entry, was chargeable with notice that, in the application of Edward Jenner Smith to enter certain lands, a mistake had been made, and that said Smith intended to enter and did enter the land in controversy.

VII.

In reversing the judgment of the circuit court dismissing the cross action of the defendants Johnston and Jungher.

VIII.

In holding that the defendants Johnston and Jungher had any such interest in the land in controversy as entitled them, against the patent issued by the United States to the plaintiff in error, to intervene in this action, or to entitle them to affirmative equitable relief against the legal estate and title vested in the plaintiff in error by said patent.

IX.

In not giving judgment in favor of the plaintiff in error for the possession of the land in controversy.

Although under the system of pleading in civil cases in the courts of Missouri there is but one form of action, an equitable defence is, nevertheless, permitted to be set up by way of cross action in the answer. In such case the cross complaint is in the nature of a bill in equity and must set forth such a state of facts, and be supported by such proofs, as would have entitled the complainant to the relief sought under the usual form of equity proceedings.

Maguire *v.* Vice, 20 Mo., 431.
Myers *v.* Field, 37 Mo., 434.
Bohall *v.* Dilla, 114 U. S., 47.

The right asserted by both parties to the land in contro versy is based upon a purchase from the United States. The title of the plaintiff in error, under a patent from the United States, is put in issue, thus presenting a question of which this court will take cognisance.

Moore *v.* Robbins, 96 U. S., 531.
Minnesot *v.* Bachelder, 1 Wall., 109.

It seems from the record that some testimony as to the rule of the land department in certain cases was presented to the trial court with the view of impeaching the validity of the patent issued to the plaintiff in error. It was shown by the testimony of the witness Reiche that the rule did not apply in cases like the present (record, p. 75).

A patent raises the presumption that all previous steps have been taken to justify its issue.

Polk *v.* Wendell, 9 Cranch, 87.
Minter *v.* Crommelin, 18 How., 87.

There is no proceeding in this case such as is requisite to the impeachment or setting aside of a patent of the United

States. (Field *v.* Seabury, 19 How., 323; Smelting Co. *v.* Kemp, 104 U. S., 636; U. S. *v.* Throckmorton, 98 *Id.*, 61). The case attempted to be made by the cross-action (answer), which concedes that the legal title is in the plaintiff in error, is to divest him of that title by having the plaintiff in error declared a trustee for the benefit of the defendants in error, or their grantees.

On the Facts.

There is no serious controversy as to what the real and controlling facts are. The conclusions and resulting rights to be drawn therefrom are the matters in controversy.

Edward Jenner Smith personally applied for, paid for, and accepted a duplicate receiver's receipt and a register's final certificate of entry for the southwest ¼ of sec. 36, town. 64, range 6, Missouri.

In 1839, John D. Smith, to whom it appears Edward Jenner Smith had sold the *southeast* ¼ of sec. 36, deposited the receiver's duplicate receipt for payment for the *southwest* quarter in the General Land Office (record, p. 124), and without objection received and accepted the corresponding patent which had become matter of record, Aug. 30, 1838 (record, p. 123).

No claim is advanced that Smith, or any other person, ever, in fact, applied for, paid for, or took or received any evidence of title, either preliminary or final, for the southeast quarter of section 36, prior to the location of the plaintiff in error and his receipt of a patent therefor in 1871.

The contention and finding below was that Smith *intended* to have applied for the southeast quarter when he applied for the southwest quarter, and to have paid for that tract when he paid for another, and that such intention not only

vested the equitable title to said southeast quarter in him, but severed said tract so intended to be entered from the body of the public domain; that the plaintiff in error is chargeable with such notice of the said *intent* of Smith and of the error committed as to constitute his subsequent entry a fraudulent one.

Speculation as to what was in the mind of a person fifty years ago is not a safe ground on which to determine present rights of property, especially where that intent is to be sought for the express purpose of negativing all the acts done by such party. A ruling that a party who had before him the evidence, in the most solemn and conclusive form, of the purposes of another, and of the acts done in accordance therewith, must be held to have known that the purposes so evidenced were not the real ones of such other party, but that the acts done by him were a mistake, is, upon its face, contrary to every settled presumption of the law, and can only be sustained by the most convincing proofs.

There were no such proofs in the records of the land department.

Unless shown to be possessed of special knowledge to the contrary, the responsibility of the plaintiff in error as a purchaser of the public lands began and ended with the ascertainment of the fact, either from the register or by his own examination, that the tract was open to entry.

It is clear, from the testimony of register Reiche (record, pp. 71–78), that if any uninformed person had inquired on the day the plaintiff made his entry for vacant lands in that vicinity, that this tract would have been pointed out and would have been sold to him if regularly applied for.

Even conceding that the plaintiff in error was familiar with the records and methods of the land office in disposing of public lands, it is nevertheless true that there was not

a record in existence when he made his application which evidenced a previous sale of the said southeast quarter. The utmost claim is that there was evidence that an erasure of something had been made in the space or diagram representing the southeast quarter on the plat book, and that in the tract book there had been an erasure and a change of a letter in the description of another tract in the same section. These are the indices which it is insisted should have led to inquiries that, if made, would have resulted in informing the then proposing purchaser that the tract had already been sold. This theory cannot be sustained. The system of land sales is precise; the record made is prescribed by law. If an erasure on the plat book indicated that there might have been a previous sale of the tract, resort first to the application required by law to be kept on file, then to the tract and other books of record would settle the question. It may be presumed that plaintiff in error pursued that inquiry. If he did, the record indubitably informed him that no application had ever been made for the southeast quarter of section 36, and that no receipt or certificate had ever issued therefor. If he was bound to examine and take notice of what appeared of record as to *other* tracts he was not proposing to purchase, and therefore of the erasure or alteration on the tract book in connection with the letter "W" in the record of Smith's purchase of July 6, 1836, his proper resort to determine whether the alteration was a proper correction, or a mistake or wrongdoing, was to the other and original records. Such a resort would have shown that, had any letter other than "W" been there, the record would have been false, being contradicted by the application for such other tract, by every other record kept in the local office, and finally by the evidence there present that a patent had been issued to and accepted by the parties in interest in

accordance with the whole record to which the tract book entry, including the "W," conformed. (Letter of commissioner to register, record, p. 124, and patent, p. 123). To one acquainted with the records, the fact that there was an appearance of erasures was not cause of suspicion of error or wrongdoing calling for unusual caution. They necessarily occurred in transacting so large a business; they frequently appear. The register then in office, testifying in this case with the records before him, said: "Erasures of this charac- "ter are very numerous in all the records of this office, and "is a natural consequence from the manner of conducting "the business of the office. It is very unusual that an error "will run through all the records of the office. The original "application is the basis of all the entries, and all errors "are usually detected by comparison of the returns at the "end of the month. It appears that all the officers of the "office have corrected their records to conform to the or- "iginal applications" (record, p. 74). The same witness, at p. 78 of the record, further states the practice as to the correction of errors by succeeding officers, and testifies to the frequency of double entries as appear by the record.

Upon the theory that the plaintiff in error is to be charged with knowledge of all that appeared of record at the local and General Land Offices respecting the tract of land in controversy, it is submitted that it is clear beyond all question that he could not have concluded that E. Jenner Smith had ever acquired an interest in said tract save by the process of discrediting the personal act of Smith and the whole official record.

On the Law.

The record in the land office touching the tract in controversy was made up according to law. The plaintiff in

error had the right to rely upon it, and the defendants in error are bound by it.

The tract was of the class known as "offered land subject to sale at one dollar and twenty-five cents per acre." The principal acts governing the sale were:

The act of Congress approved Feby. 24, 1810 (2 *Stats.*, 556), requiring that from the first day of June thereafter every applicant to purchase at private sale "shall produce "to the register a memorandum in writing describing the "tract, which he shall enter by the proper number of the "section, half section, or quarter (as the case may be), and "of the township and range, subscribing his name thereto, "which memorandum the register shall file and preserve in "his office."

The act approved April 24, 1820 (3 *Stats.*, 566), providing the method of disposal of "all the public lands of the United States, the sale of which is or may be authorized by law."

This act required (sec. 2) that a "purchaser at private "sale shall produce to the register of the land office a receipt "from the treasurer of the United States, or from the re-"ceiver of public moneys of the district, for the amount of "the purchase money on any tract before he shall enter "the same at the land office."

The act of May 24, 1824 (4 *Stats.*, 31), supplementary to the act of March 3, 1819 (3 Stats., 526), entitled "An act providing for the correction of errors in making entries of lands at the land offices," by which was prescribed the method and period within which mistakes precisely such as is alleged in Smith's case could be remedied and the payment transferred "from the tract erroneously entered to that intended to be entered, if unsold; but, if sold, to any other tract liable to entry."

The act of January 12, 1825 (4 *Stats.*, 80), authorizing repayment for land erroneously sold by the United States.

The forms, terms, and conditions of the sale of the public lands are prescribed by law; and the acts of Congress, together with the regulations of the land department lawfully made, become a part of the contract in every sale.

Bagnell *v.* Broderick, 13 Pet., 436.
Wilcox *v.* Jackson, *Id.*, 498.
Jourdan *v.* Barrett, 4 How., 169.
Irvine *v.* Marshall, 20 *Id.*, 558.
Johnson *v.* Towsley, 13 Wall., 72.

The doctrine, as understood and practiced in the land department, is that "the act of Congress authorizing purchases of the public land is a contract in which the law has stipulated certain conditions so as to secure fairness, protect private interests, and save the public from fraud or peculation, by certain checks. When these conditions have not been strictly performed by the one party, to wit, the applicant, it is at his own peril, and the Government is thereby relieved from responsibility."

1 Lester's Land Laws, &c., 675.

The inquiry that a proper court may institute after the title has passed from the Government and become matter of private ownership, is whether, according to the established rules of equity, *and the acts of Congress concerning the disposal of the public lands*, the party having that title should hold it absolutely or as trustee for another.

Johnson *v.* Towsley, *supra.*
Warren *v.* Van Brunt, 19 Wall., 646.

The essential thing is, that one invoking the aid of a court of equity to reverse the act of the land department should be able to show that he had done all that the law re-

quired of him, and that, by the record and case, as made in that department, the decision ought to have been for him.

Lytle *v.* Arkansas, 9 How., 314.
Stark *v.* Starrs, 6 Wall., 402.
Bohall *v.* Dilla, 114 U. S., 47.

The validity of an entry of public lands depends on the conformity of the proceedings taken to that end with the land laws of the United States.

Matthews *v.* Zane, 7 Wheat., 244.

Among the many cases decided by this court, under the general doctrine that "where one party has acquired the legal title to land to which another has the better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title," there are none that hold that there may be a recovery of the legal title on proof of an *intention* only to acquire; and that such claimant may deny the record in the land department on which he there based his claim. In the decided cases the parties claimant each stood on the record made in the land department. Such are:

Stark *v.* Starrs, *supra.*
Bohall *v.* Dilla, *supra.*

The acts of Congress already cited, "providing for the correction of errors in making entries of lands at the land offices" (4 Stats., 31), are *in pari materia* with the act of February 24, 1810 (2 Stats., 556), and may fairly be considered as determining and limiting the time and manner in which an applicant may vary or avoid his own act, as evidenced by his application.

The requirement, among others, is that he who alleges his own mistake, and petitions for leave to correct it, must show "*that every reasonable precaution and exertion had been used to avoid the error;*" and in making this to ap-

pear the act provided "that the oath of the person or persons interested shall in no case be deemed sufficient, in the absence of other corroborating testimony, to authorize any such change of entry." (Act May 24, 1824, *supra*). And this legislation is in accord with the equitable doctrine that, "where a written instrument is sought to be reformed upon the ground that by mistake it does not correctly set forth the intention of the parties, * * * the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument."

Howland *v.* Blake, 97 U. S., 64.
Kent *v.* Laslie, 24 Wis., 654.
Story Eq. Jur., sec. 1201*a* (11th ed.)

The said act of May 24, 1824, was a special provision in aid of those who, in dealing with the United States as purchasers of the public lands, had made mistakes to their own detriment. It conferred a right with a statutory remedy which was in all respects adequate for protecting it. In such case the party is confined to the remedy given.

Pritchard *v.* Norton, 106 U. S., 131.
P. C. & St. L. Railway Co. *v.* Hines, adm'x, 25 Ohio, 629.
Smith *v.* Lockwood, 13 Barb., 209.
Franklin Glass Co. *v.* White, 14 Mass., 286.

Mistakes resulting from gross negligence will not be relieved against by equity.

Lewis *v.* Lewis, 5 Oreg., 169.
August *v.* Seiskina, 6 Caldw. (Tenn.), 166.
Moran *v.* McLarty, 11 Hun. (N. Y.), 66.

Where the description in the application, the duplicate receiver's receipt, the tract book, the receipt book, and in the record of certificates issued correspond, the fact that the

number of the application was written upon another tract on the plat in the land office is not evidence of a mistake entitling the plaintiff to relief in equity.

The Iowa R.R. Land Co. *v.* Adkins, 38 Iowa, 351.

The legal title cannot be made to yield to an equity founded in the mistake of a ministerial officer.

Miller *v.* Kerr, 7 Wheat., 1.

To sustain the theory that E. Jenner Smith intended by his proceedings at the local land office in 1836, to enter the southeast quarter, is to admit him to be chargeable with gross carelessness and neglect. He not only affixed his signature to a document which, as alleged by the defendants in error, did not express his purpose, but he accepted and held two formal documents which would constantly remind him of an error, had there been one. The certificate and receipt issued to him were documents of primary importance which, in the estimation of the early purchasers, had almost the dignity of a patent. (Simmons *v.* Ogle, 105 U. S., 274).

The assumption of the court below that the plaintiff in error had, or was chargeable with, knowledge of an alleged mistake which the party who it is asserted committed it, never either alleged or discovered, is utterly untenable.

These documents of primary importance—that is, the certificate and receipt issued to E. Jenner Smith—came into the hands of John D. Smith, who, according to the chain of title in evidence, succeeded to his interest (record, p. 82). He exchanged them for the patent which they called for (record, 124), but there is no evidence that they suggested to him that a mistake had been made. It is difficult to perceive on what theory the plaintiff in error is to be charged with notice of an alleged mistake on facts and surroundings which were not sufficient to awaken a suspicion

in the minds of the interested parties. Those parties, as shown by the record, were not ignorant or uninformed, but were dealers or speculators in the public lands (record, pp. 85, 86, 100).

The supreme court of Missouri found against the plaintiff in error, on the theory that his act in making the entry was constructively fraudulent, citing, in support of that position, sec. 395 of Story's Equity Jurisprudence.

The doctrine there laid down is, that such fraud is chargeable "where a person purchases *with full notice* of the legal or equitable title of other persons to the same property; * * * he becomes by such conduct *particeps criminis* with the *fraudulent grantor*." For the purposes of this case, under the doctrine as thus laid down by this eminent authority, the United States must stand for the fraudulent grantor. She it was who, on the theory of the learned court below, had, in 1836, parted with the equitable title to Smith, with the accompanying right to receive the legal title as well, and whose act, therefore, of 1871, in conveying the land by patent to Widdicombe, was a fraud upon Smith and his grantees.

We insist, for the plaintiff in error, that, tried by this rule, it must be held under a proper interpretation of the statutes governing public land sales before quoted, that no title, legal or equitable, ever passed to Smith for the tract in controversy, and that there is no state of case made out which can be held to place the United States in the attitude of a fraudulent grantor, but that the right of sale remained in the United States until exercised in favor of the plaintiff in error, and that the right of purchase was in him when exercised unimpaired by any infirmity in the title of his grantor.

But if it were otherwise, it is agreed that the plaintiff in error would hold the tract under his patent free from liability because of the fraud of his grantor, unless notice

of that fraud, actual or constructive, be brought home to him.

The burden of proof is on him who asserts notice.

Bartlett *v.* Varner, 56 Ala., 580.

Neither suspicion, rumor, nor vague speculation is sufficient to put one upon inquiry.

Lamont *v.* Stimson, 5 Wis., 443.

Wilson *v.* McCullough, 23 Penn. St., 440.

This court, in *Wilson* v. *Wall* (6 Wallace, at page 91), quoted approvingly, from Sugden on Vendors, the language of Lord Chancellor Cranworth in *Ware* v. *Lord Egmont*, that on the subject of constructive notice "it was highly inexpedient for courts of equity to extend the doctrine," and saying, "When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say, not only that he *might have acquired*, but also that he ought to have acquired, it but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

Constructive notice of a prior conveyance may only be imputed in cases in which the party had actual notice that the property in dispute was in fact charged, incumbered, or in *some way affected*; and the court has thereupon bound him with constructive notice of *facts and instruments*, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property of which he had actual notice, or where it is made clear by the evidence that the party charged had

designedly abstained from inquiries for the very purpose of avoiding notice.

Story's Equity, note 4, p. 402.
Jones *v.* Smith, 1 Hare, R., 43.

Laches, as well as positive fault, is a bar to equitable relief. Lapse of time is held to bar relief.

Clark *v.* Boorman's Ex'rs, 18 Wall., 493.
Sullivan *v.* Portland & Kennebec R.R. Co., 94 U. S., 806.
Brown *v.* County of Buena Vista, 95 U. S., 161.
Godden *v.* Kimmell, 99 *Id.*, 201.
U. S. *v.* Tichenor, 12 Fed. Rep., 415.
U. S. *v.* McGraw, *Id.*, 449.

The cause of action propounded by the defendants in error in their cross action lay dormant from 1838 to 1874, a period of 36 years; they and their predecessors in interest were at all times informed of the actual state of their own title by the possession of most solemn and authoritative documents which plainly stated it.

They took no steps to correct the record; they asserted no visible possession or dominion over the property. These facts present a case on which a court of equity cannot decree for defendants in error.

Harkness *v.* Underhill, 1 Bk., 316.
Board of Com'rs *v.* Railway Co., 18 Fed. Rep., 209.

The grantees of the defendants—the McKees and Buell and Fallen—purchased their interests one and two years after the patent to the plaintiff in error had been recorded in the proper county (record, pp. 89 and 116).

There was no party defendant in the court below competent to set up a defence in equity against, or in any manner to call in question, the patent of the United States to the plaintiff in error.

The defendants below, Lucretia A. Jungher and Sallie F. Johnston, who are defendants in error here, were made parties in the trial court, on their own motion, upon the ground of interest growing out of the alleged fact that they—one as widow and the other as heir-at-law of one Theodore Jungher, who died seized of the lands—had since his death sold and conveyed the same by deed of general warranty, and would therefore be responsible to their grantees on their warranty should they be dispossessed of the premises (record, p. 9). The answer on which the trial was had set up the same facts, naming John W. and Samuel McKee as such grantees.

The chain of title put in evidence by defendants in error shows a power of attorney, dated 15th April, 1870, to B. F. Hagerman, from defendants Jungher and Johnston to sell land; a deed of Lucretia Jungher and others, by Hagerman as attorney, to Buell and Fallon for 35 acres off of southeast quarter 36, 64, 6, dated December 29, 1874, with covenants of warranty, and a deed by B. F. Hagerman, attorney in fact for Jungher and others, to Samuel and John W. McKee for remainder of the said southeast quarter section, dated January 19, 1873, with covenants of general warranty (record, pp. 88 and 89).

The answer of these defendants, in the nature of a cross action and suit in equity, was filed March 6, 1877 (record, p. 22). It thus appears that, at that time, they had divested themselves of all title, interest, or claim to the premises.

The interest and responsibility of the said defendants in the whole subject-matter was, at the date of their application to be made parties, their liability in an action at law for the return to their grantees of the purchase money should the title fail, and their right to recover purchase money for the same cause from the grantor of their ancestor, from whom a warranty deed had been taken Sept. 18, 1850 (record, p. 87).

The only persons interested in the title, if any interest existed adverse to that of Widdicombe, were the McKees and Buell and Fallon, but neither of these was made a party.

The general rule is, that "all persons are to be made parties who are legally or beneficially interested in the subject-matter and result of the suit."

Caldwell *v.* Taggart, 4 Pet., 190.
Shields *v.* Barrow, 17 How., 130.
Coinn *v.* Milladen, 19 *Id.*, 113.
Wyche *v.* Green, 32 Ga., 341.

In a recent case in the circuit court for the district of California, the suit being by the United States to set aside her own patent for certain lands brought against the grantee named in the patent, who in the meantime had sold the land, it was held, "the defendant in the suit having no interest in the subject-matter involved is not even a necessary, if a proper, party to the bill to annul the patents. * * * All the indispensable parties are omitted from the bill, and those not necessary to be made parties are sued."

United States *v* Cent. Pac. R.R., 11 Fed. Rep., 449.

The requirement of the Missouri Code is—"Sec. 3,462. Every action shall be prosecuted in the name of the real party in interest."

"Sec. 3,466. Parties who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should be joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the petition."

The trial court held that no affirmative relief could be given on the cross petition to defendants Jungher and Johnston because, not being the owners of the equitable title, they are not entitled to a decree vesting in them the legal title, and dismissed the cross action (record, p. 41).

The supreme court of Missouri reversed this portion of the judgment below on the ground that, under the operation of sec. 3,940 of the Code of that State, title acquired by the defendants would instantly have inured to the benefit of any persons claiming under them by deeds of general warranty (record, p. 149).

The section referred to is the usual statutory provision, that one who, by his deed, undertakes to convey an estate in fee-simple absolute, not having at the time the legal title, but afterwards acquires it, such after acquired title shall immediately pass to the grantee. (Revised Code of Missouri, 1879, p. 675).

The learned court in so holding evidently fell into the error of construing a statute for the assurance of rights and the prevention of frauds in a special contingency as having the effect of changing the law of the State, and the general rule with respect to parties to the action.

There is some intimation in the record that defendants Jungher and Johnston were notified by their grantees to make defence to plaintiff's action in ejectment, and that this gave them a status as defendants; but such notice properly given merely relieves the grantee from the burden of being afterwards obliged, in the action on the covenant, to prove the validity of the title of the adverse claimant.

Cooper *v.* Watson, 10 Wend., 202.

Turner *v.* Goodrich, 26 Vt., 708.

City of St. Louis *v.* Bessell, 46 Mo., 157.

The equitable defence failing, the plaintiff in error was entitled to judgment upon his legal title, as shown by his patent.

Bohall *v.* Dilla, 114 U. S., 51.

We ask that such be the order and judgment of this court.

S. S. BURDETT,

Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1887.

No. 89.

ALBERT C. WIDDICOMBE, PLAINTIFF IN ERROR,

vs.

OLIVER P. CHILDERS, LUCRETIA A. IUNGHERR, SALLIE F. JOHNSTONE, AND H. WILL JOHNSTONE, DEFENDANTS IN ERROR.

In Error to Supreme Court of Missouri.

BRIEF FOR DEFENDANTS IN ERROR.

JAMES HAGERMAN,
Attorney for Appellees.

JUDD & DETWEILER, PRINTERS.

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In Error to Supreme Court of Missouri.

BRIEF FOR DEFENDANTS IN ERROR.

Deeming the statement of the plaintiff in error incorrect and incomplete, we present the following on behalf of the defendants in error:

THE PLEADINGS.

This was a suit in ejectment to recover southeast quarter section 36, township 64, range 6, Clarke county, Missouri, originally begun in that county, and by change of venue,

applied for by plaintiff, taken to Marion county, where it was tried and decree rendered for defendants, and on appeal to the supreme court of Missouri the decree, after full hearing, was affirmed.

The petition was in the ordinary form of an ejectment suit. (Record, 4.)

The separate amended answer, which consisted of equitable defences, as authorized by the laws of Missouri, and on which the case was tried, sets out the facts and is a clear statement of the defense, and we ask that it be fully read and considered.

See "separate amended answer of Lucretia A. Iungherr, Sallie F. Johnstone, and H. Will Johnstone, her husband." (Record, 23–29.)

REPLY.

To this answer there was a replication (Record, 34–38) containing a general denial. On the trial the circuit court rendered the decree, which contains specific findings of facts, and is found in the record, pages 38 to 41.

EVIDENCE FOR DEFENDANTS.

1. A certified copy of applications of Robert Wooden, No. 7417 and 7418. First, for west one-half of section 36, township 64, range 6; second, for west one-half of northeast quarter, same section. Both dated November 8th, 1834, Record, 43 and 44. Exs. D and E. [The exhibits are given so the reference to them by the Boonville witnesses may be understood.]

2. A certified copy of register of abstract of entries of above lands. *Ibid*, 45 and 46. Ex. F.

3. A certified copy of patent, No. 7417, to west one-half of section 36. Dated April 10th, 1837. *Ibid*, 47.

4. A certified copy of application of Edward Jenner Smith, No. 14513, for east one-half of southeast quarter, section 30; east one-half of southeast quarter, section 31; east one-half of northeast quarter, and east half of southeast quarter, section 25; east half of northeast quarter, and southwest quarter of section 36, township 64, range 6. Dated July 6th, 1836. *Ibid*, 48. Ex. C.

5. A certified copy of plat book of section 36, township 64, range 6, with numbers marked thereon. *Ibid*, 49. Ex. A.

6. A certified copy of tract book relating to said section 36. *Ibid*, 50. Ex. B.

7. A certified copy of register receipts relating to application No. 14513. *Ibid*, 52. Ex. G.

Deposition of John N. Gott. (Record, 53 to 70.)

(Taken at Boonville, Mo.)

8. My age is forty-three years; occupation, clerk; residence, Boonville, Mo.; was appointed receiver of United States land office at Boonville in spring of 1870, and held the position for four years; am acquainted with the plaintiff since before I went into the land office. He was residing at Boonville when I first came there in 1866. He has been a practicing lawyer since I have known him. I believe his practice has been more pertaining to land titles and matters before the United States Land Office. He might be called a land

lawyer. He practiced before the State and Federal courts and in the general and local land offices. He has been plaintiff in a few land cases to my knowledge. He has had cases for other parties before the land offices and State and Federal courts. I don't think I could name a case now which he has taken to the State or Federal courts. He has been practicing before this local land office here in Boonville, and has had more or less business before it. He has to my knowledge carried cases before the General Land Office at Washington, D. C., for other parties. During the earlier part of my acquaintance with the plaintiff his brother-in-law, George W. Boardman, was register of this land office at Boonville. He was register, to the best of my recollection, from the early part of 1861 until the summer or fall of 1866. He (Boardman) was not after that with the General Land Office at Washington, D. C.

During my connection with the Boonville land office as receiver plaintiff entered quite a number of tracts; he entered some tracts which proved in conflict with prior entries or claims. These conflicts were not confined to entries made by plaintiff, but happened with other entries made by other parties. These conflicts happened more frequently with the plaintiff for the reason he made more entries. During the time I was receiver of the land office he was frequently at the land office examining the records of the office; he spent a good deal of time at the office. His office was not more than two blocks away from the land office. His office is at the present time, I believe, next door to the land office.

His fortunate adventures in entering land in thickly settled parts of the State and trying to secure the legal title to same, has been the subject of remark in this community.

During the time I was receiver of the land office here a communication was received from the General Land Office by the receiver notifying this office that the plaintiff had been excluded from practicing before that office; the register informed me of the letter; it was received, I think, in the winter of 1873 and 1874. I know but little of his practice but before the land office. I don't now recollect of any case which he has had except before the said office. I know of one case where Widdicombe (plaintiff) procured a patent for land which had been before entered by other parties and had been owned and occupied by them for a long time and was in cultivation. This farm was in Howard county, in this State, across the river. There was a litigation about this matter, which resulted in his defeat.

Here paper is shown witness, Exhibit "A," certified copy of plat of section 36.

I am familiar with the original plat books now in the office of the United States land office at Boonville. I have a fair average knowledge of different handwritings. I have been, in addition to receiver, bookkeeper in the Central National Bank, and am familiar with different handwritings.

Question. Will you turn to the original plat of which Exhibit "A" is a copy and say whether or not upon the southeast quarter of section 36 thereof there has been any erasure?

Witness examines original plat.

Answer. I should say there has been an erasure on the southeast quarter of section 36. I am certain of it.

Ques. Look at Exhibit "A" and state where the erasure occurs on the original plat.

Ans. Partly under the figures No. 1,520 and between said figures and the letters A. C. Scrip above.

Ques. State how plain this erasure is.

Ans. It is perfectly apparent to the naked eye.

Ques. Look at the original plat and examine the figures on the southwest quarter section 36, No. "14513," and on the east half northeast quarter section 36; also examine figures "14513" and state whether or not they are in the same handwriting.

Ans. I should say that they were made by different parties. I am certain of it. The figures on the southwest quarter appear to be in a darker ink than those on the east half of northeast quarter of same section, and they are of a different construction. I could not say it was intended to make them look alike. There is a general similarity in the figures, but there is a difference in construction; the difference is very visible to me, but might not be observed by a casual observer.

Ques. Look at the figures 7417 on the southwest and northwest quarter and the figures 7418 on the west half of northeast quarter section 36 and state whether they are in the same handwriting with the figures "14513" in the east half of the northeast quarter of section 36, or are they in the same handwriting as the figures "14513" in the southwest quarter of said section 36?

Ans. I believe the figures "7417" and "7418" and the figures "14513" in the east half of the northeast quarter of said section to be in the same handwriting and in a different handwriting from the figures 14513 on the southwest quarter of said section 36.

Ques. On the original plat in what ink are the words A. C. Scrip and the figures No. 1520 on said southeast quarter of section 36 written?

Ans. They appear to have been written with red ink. I can't say in whose handwriting they are. At the time I was receiver Wm. Whist and E. G. Evans were registers, and these words are not in the handwriting of either of them.

Witness here shown paper Exhibit "B" tract book.

Ques. State what this paper is.

Ans. It is a certified copy of all the entries in section 36, township 64, range 6, as same appear upon the original tract book of the former Palmyra and Boonville United States land office.

Ques. Turn to the original tract book from which this copy is made and state what you see there in the way of erasure or change of words or letters as originally written thereon.

Witness examines the original tract book and identifies it.

Ans. I observe that the description of the southwest quarter in said section 36, in the entry by Edward J. Smith, has been changed from what it originally was. In said description east half of northeast and southwest quarter, as it now appears on the original tract book, and on Exhibit "B" the letter "W" of said description appears to be substituted for some other letter previously erased. This letter "W" appears to be of a darker color than the other letters of said entry, and in a heavier and different handwriting, and has a much fresher appearance. I should say the erasure of some other letter and the substitution of the letter "W" was apparent to the casual observer.

Ques. On the original tract book in what kind of ink is the entry of the southeast quarter to A. C. Widdicombe?

Ans. It appears to have been with red ink.

Witness shown paper, Exhibit "C," copy of the original cash application made by Edward J. Smith, and also the original thereof, and identifies them and says: "The writing in the original application, except the signature of Edward J. Smith, and in the tract book, Exhibit 'B,' relating to entries of Robert Wooden and Edward J. Smith, except the substituted letter 'W,' are in the same handwriting."

Witness also compares the writing in the original applications of Robert Wooden, 7,417 and 7,418, Exhibits "D" and "E," with the original of Exhibit "C" (Smith's application), and with original entries on the tract book pertaining to the entries of Robert Wooden and Edward J. Smith, and says they are all in the same handwriting except the signatures of the applicants and the substituted letter W above referred to.

The original of Exhibit "F" here shown witness, and he says it is a register of cash certificates issued by the register, and the handwriting is that of Wm. Wright, the register, and is the same as the handwriting in the original Exhibits "B, C, D, and E," except the signatures of applicants and the substituted letter W, and except the entry of Widdicombe in Exhibit "B."

The entries of Wooden and Smith on the original registry are in the same handwriting and upon different pages and at different dates. I am familiar with the mode of making entries in the office at Boonville, and it appears from the records, as far back as 1834, the entries were made in the same manner as at the present time.

Ques. Look at the originals of Exhibit "A" (plat book), and "B" (tract book), "C" (application), and "F" (registry), and state which of the parts thereof relating to the entry of Edward Jenner Smith is the first and original entry made by the register.

Ans. That part of original Exhibit "B" which refers to the entry of Edward Jenner Smith is the first and original entry made by the register.

Ques. Am I to understand that that part of the original of Exhibit "B" relating to the entry of Edward Jenner Smith as it stood before the erasure and substitution of the letter W, to which you have testified, as the part first written by the register or the original entry by the register?

Ans. Yes; I should say that it was.

Ques. State the mode, as you understand it, of making cash entries.

Ans. On the presentation of an application to the register for a cash entry the register first examines the plat book and then the tract book, if the land applied for appears to be subject to entry, he makes record in the tract book, giving a description of the land applied for, the area, to whom sold, the date of application; then he marks upon the plat the current number of the entry; then he certifies to the number of acres so entered and the price paid for the same, upon which application and certificate of the register the receiver issues a receipt to the applicant for the money paid for the land as certified to by the register.

Ques. Describe the tract book to which you refer, stating how it is arranged.

Ans. It is a record containing the sections of land arranged

numerically, with the original entries made in each section, as indicated in Exhibit "B."

Witness resumes:

A party coming to the land office to find what land has been entered would look at the plat book first, then to ascertain more definitely, at the tract book.

Ques. Suppose that Edward Jenner Smith came to the land office on the 6th day of July, 1836, for the purpose of entering land, what land would have been shown by the plat book and the tract book to be for sale in section 36, township 64, range 6?

Ans. I would say from the appearance of the record that the southeast quarter and east half of northeast quarter of said section, appeared to be undisposed of at that date.

I think it proble that Edward J. Smith had examined the tract book and plat prior to or on the day of the entry. The body of the application of Smith is in the handwriting of the register at that time.

Ques. Suppose that the part of the original of Exhibit "B" relating to the entry of Edward Jenner Smith, containing the description of the land, was originally written by the register, the east half of the northeast quarter and southeast quarter section 36, township 64, range 6, and at the same time the register entered upon the original of Exhibit "A" on the southeast quarter of said section the number 14513 of entry of said Smith, are not the probabilities that the register intended to sell and the said Smith intended to buy the said southeast quarter, and not the southwest quarter, and that the register made a mistake in filling out the body of application of said Smith?

In answering this question take into consideration the fact that the tract book, only two lines above the entry of said Smith, shows that the southwest quarter had been previously entered by Robert Wooden.

Ans. In my opinion, judging from the dates and descriptions as given in said section 36, Edward Jenner Smith intended to enter the southeast quarter and east half of northeast quarter of said section 36, and that the register intended to sell said tracts, and that the register committed an error in filling out the application, for the reason that the tract book and plat showed plainly that the west half of said section had previously been disposed of.

Witness continues:

The plats furnished the different counties are supposed to be exact copies of the original plat of survey as to sectional lines, rivers, boundaries, and area of fractional tracts, with the names of the parties who had purchased lands written upon each tract. The names are obtained from the tract book.

If a certified copy of the plat sent from Palmyra or this office showed that all of section 36 had been entered, the west half and the west half of the northeast quarter, by Robert Wooden, and the east half of the northeast quarter and southeast quarter by Edward Jenner Smith, it is probable that it conformed to the original entries on the plat and tract book at the time it was made.

It is possible but not altogether probable that the register, at the time Smith entered his land, examined the plat and tract book and made the proper entries thereon relating to said southeast quarter, and then immediately wrote out the

application, and in writing out said application made the mistake in inserting therein the southwest instead of the southeast quarter of said section.

From the year 1834 to 1836, I should say there was a large number of entries made at the land office at Palmyra, judging from the large increase of the current number of entries made from the entry of Wooden to the entry by Smith.

Cross-examination by plaintiff personally:

The witness enumerates a number of cases where land has been entered in settled portions of the State by other parties than plaintiff. The attention of witness is called to a number of erasures on plat and tract book in other sections, but says all such were made by the parties making the original entries.

The witness testified that the register makes the sales and the receiver receives the money.

Re-examination:

I have been cross-examined by the plaintiff in person. During his examination he has refreshed my recollection with regard to the persons who have been engaged in the purchase of lands at this office. He has also called my attention to the erasures to which I have testified. He has, in conducting the examination, evinced a very great familiarity with the business and records of this land office. A number of entries have been made by the plaintiff in the name of Catherine Boardman, the wife of George W. Boardman (formerly register), and sister of the plaintiff. None of the entries to which he called my attention on the tract book and plat show a double entry except in the section 36

in controversy. I perceive no double numbers upon any other tract in said township, except the southwest quarter referred to. I fail to perceive any erasures upon the tract book and plat book of the same tract embraced in those entries to which my attention has been called, except the said southeast quarter of section 36. I should say that the substituted letter W in the entry of Edward Jenner Smith in section 36, township 64, range 6, was subsequent to the date of entry, for the reason that other corrections made at the time these entries were made were much better executed and conformed more strictly to the handwriting of the register at that time. I should say the substituted letter "W" was not in the handwriting of the register who made the entry.

Ques. Suppose the original entry on the tract book showed that Edward Jenner Smith entered the southeast quarter of said section 36 and the number on the original plat corresponded with such entry in the tract book, and suppose that after years had elapsed another register and receiver had come into office, and suppose that they or either of them had ascertained, or had their attention called by another, that the original application of said Smith called for the southwest quarter instead of the southeast quarter, and suppose that only two lines above the original entry on the tract book, and from the original plat it appeared that the said southwest quarter had been previously entered by Robert Wooden, state whether or not the receiver or register, or one or both of them, would have had the right to have changed the said entry on the tract book, by erasing the letter E in said southeast quarter and substituting the letter "W" instead thereof, and to have changed the orig-

inal plat book by erasing from the southeast quarter, the number of the certificate of the entry, 14,513, and placing the said number, 14,513, on the southwest quarter of said plat, where the number of said Wooden's certificate, namely, 7,417, had been previously placed.

Ans. I should say that upon the discovery by the register and receiver of a conflict between the tract and plat-book and the original application they would not necessarily be compelled to correct the records to agree with the application, unless so instructed by the Commissioner of the General Land Office, and if so instructed the proper notations should have been made upon the tract book referring to such authority by date. The custom of the office would not require them to voluntarily make the change. If it appeared to them that there had been a mistake in the application, they would have no right whatever, either to make the change voluntarily or to offer it for sale, without complying with the instructions from the General Land Office, relating to lands kept out of market by erroneous marking of the books or record. The mode of procedure as to lands kept out of market by erroneous marking of the records, as has been the custom, is to report them to the General Land Office, upon which report authority is given by the Commissioner to restore them to market by publication, and generally when the land is applied to be restored to market, by an individual, it is usual to publish the notice in the paper having the largest circulation in the county where the land lies. I can't say whether land thus restored to market can be entered by agricultural scrip.

The tract and plat books are the books examined by the public generally to ascertain what lands have been entered and what are for sale.

There appears to have been sold for cash at the Palmyra land office during July, 1836, 74,700 acres for which there was received $93,376, and the number of entries made during that month were 568, 32 of which applications were made on the 6th day of said month. I can't say how the register came to write the southwest quarter on the application and southeast quarter on the tract book, but such evidently was the case, and I believe from experience, that the error was allowed to remain through a failure on the part of the register and receiver to properly compare their returns with the original records of entries.

I believe the plaintiff is perfectly familiar with all the laws, rules and regulations of general and local land offices.

I am aware of the fact that the monthly returns of the register and receiver have been frequently forwarded to Washington without being compared with the tract and plat books. If, at the end of the month of July, 1836, the register and receiver found upon comparison that their several records were in conflict with the tract and plat book in relation to the entry of Edward Jenner Smith and Robert Wooden, as it now appears of record, they should not have reported the entry of Edward Jenner Smith without noting upon their return the fact of such conflict. It is expected when the business is great that the entries shall be posted on the tract and plat book first, to the exclusion of other records, if the time be limited.

DEPOSITION OF GUSTAVE RICHE. (Record, 71 to 78.)

Live at Boonville; age, forty-nine years; am register of the land office at Boonville, Missouri, and have been such since July 4th, 1874. The records in this office in relation

to the entries of Robert Wooden and Edward Jenner Smith are register of entries, tract book, plat book, and the papers are original applications of purchasers, and, in the receiver's office, the register of receipts and the quarterly account current.

In Exhibit "B" (tract book) the entries follow each other in succeeding lines as in the original, except in the original that there are two lines between the entry of Smith and the entry of Widdicombe. All of Exhibit "B" in the original is on the same page. The cross lines in the exhibit are ruled exactly like the original. I have examined and searched in this office for the letter of the Commissioner of Land Office excluding Widdicombe from practice there, but am unable to find it. I have examined the plat book of this office in reference to the vacant lands in township 63, range 6, and would say, from the appearance of that record, there is no vacant land in said township.

The last cash entry of lands in said township appears to have been made July 31st, 1848, except the entry of A. C. Widdicombe, and the last warrant location appears to have been made in October, 1848.

I have examined the original plat book, showing the entry of section 36, township 64, range 6, and I find an erasure on the southeast quarter of said section.

I have compared Exhibit "A" with said plat and said erasure appears between the words "A. C. Scrip" and extending to and under the words and figures "No. 1,520." The erasure is apparent to the naked eye and was apparently made before the words A. C. Scrip were written. I have examined the numbers 7,417, in the southwest and northwest quarter, and 7,418, on the west half of the north-

east quarter, and 14,513, on the east half of the northeast and southwest quarter, and find them all in the same handwriting except the numbers 14,513, on the southwest quarter, which is in a different handwriting. The numbers on the southwest quarter, 14,513, seem to be in a fresher ink, and seem to have a newer appearance than the other numbers above referred to. I have examined the tract book at the original of Exhibit "B" and find in the Edward Jenner Smith entry the "W," describing the southwest quarter, is written on an erasure, and the "W" has a fresher and darker appearance. The "W," at the first glance, appears to be of a different handwriting, but writing on an erasure frequently changes the handwriting. I cannot say this of every one, but have observed it in my own experience. I have compared the entries relating to Robert Wooden and Edward Jenner Smith on the tract book, the registry of entries, the applications, and plat book, and I find that the handwriting in the tract book, the register of entry, and in the body of the applications are the same, with the exception of the signatures of the applicants and the letter "W," before mentioned. The numbers on the plat book, except the numbers 14,513, on the southwest quarter, and 1,520, on the southeast quarter, and the numbers endorsed on the back of the original applications, known as file numbers, are in the same handwriting.

The handwriting of the original applications, the tract book, registry of entries and plat book, except the exceptions above referred to, are in the handwriting of Wm. Wright, the register.

It appears from the records of Register Wright that during the period of the entries of Edward Jenner Smith

and Robert Wooden, all cotemporaneous entries were made by himself.

Cross-examination and re-examination:

I have been examined by the plaintiff in person. He has evinced in his examination great familiarity with the records of this office and the rules and regulations of the general and local land offices. From my acquaintance with the plaintiff, I should say that he is very familiar with the records of this office.

I never had any connection with the land office until I commenced my term of office in July, 1874. What I know of the practice of the office and the rules and regulations thereof I have learned since I was appointed register. I am now familiar with the duties of register, yet I know the general duties of the receiver. The business done now, compared with the business of 1836, I would say is very little. The register and receiver have their offices together at this land office.

If Edward Jenner Smith went to Palmyra to enter land in 1836, I think he would have applied to the register to ascertain what land in the particular section he wished to enter was vacant, and they would have examined the tract book and the plat book. They would see in looking at section 36, township 64, range 6, that the southwest quarter had been entered, if it it had been posted, and it would appear from the tract book and plat book that they were posted up at the time of Smith's application. It would certainly not have been proper for the register to have received another application for the southwest quarter, it having been already entered, if he had perceived it.

It would have been the duty of the register to have told Mr. Smith, if he had applied for the southwest quarter, that it had already been entered.

This witness having expressed his opinion that if the register had made a mistake in writing out Smith's application, contrary to his and Smith's agreement, still it would be the duty of the register and receiver to change all the records to conform to the application. Thereupon the following question was asked by defendants to draw out the reasons of the witness:

Question. Suppose that on the 6th day of July, 1836, Edward Jenner Smith intended to enter, and the register and receiver intended to sell it to him, the southeast quarter of section 36, and suppose that the original entries made by the register upon the tract book show that fact, and suppose that fact was further confirmed by the former entry of Robert Wooden of the southwest quarter, and suppose the register and receiver, at the end of the month of July, 1836, discovered that the register, in writing out the application of Edward Jenner Smith, had made a mistake and written the southwest quarter instead of the southeast quarter, would the register have been authorized or would his duty compelled him to erase the numbers from the southeast quarter and place them upon the southwest quarter of the plat, and to have erased the E in the southeast quarter and substituted the "W," thus destroying evidence of what he knew the intention of the parties to have been? If there is any rule or regulation authorizing the mutilation or destruction of such record, evidence of what he knew the intention of the parties to have been, please state it.

Answer. According to my understanding of the obligations of different officers of this office, I think that the receiver and his securities could have compelled the register to conform his record to the description of the land in the application, certified to him as vacant, and for which he had issued his receipt, which had gone out of the office, and for which the receiver and his sureties were personally responsible; by this way he would have protected the receiver, complied with the regulations, and put the purchaser in a condition where he could correct his error, if he had made any.

Witness resumes:

When I speak of the rule with regard to the restoration of land to market, I speak from recollection and practice. The rule is a written one.

THOMAS S. DUNNICA (Record, 79, 80) testified by deposition:

My age is twenty-eight years; reside at Boonville, Mo., and am cashier of banking house of Aehle, Dunnica & Co., Boonville, Mo. I regard myself as an expert in regard to handwriting. I have examined the original of Exhibit "A," and find that there has been an erasure on the southeast quarter. It is apparent to the naked eye. It is between the A. C. Scrip and the number 1,520; it appears to be in the center of the southeast quarter.

I have examined the number 14,513 on the southwest quarter and compared it with the numbers 7,417, 7,418 and the other 14,513 in the east half of the northeast quarter, and I find it, in my opinion, to be of a fresher appearance, and it appears to have been written at a later date, and it is in a

different hand, as is apparent to my eye. I can't tell what has been erased from southeast quarter of said section. I have compared the figures 14,513 on the southwest quarter with the number 1,520 on the southeast quarter. I don't think they are in the same handwriting, but I am not as positive with regard to these figures as the others, as the number 1,520 is written over an erasure and the ink has spread somewhat. I have compared the figures 7,417, 7,418, and 14,513 in the east half of the northeast quarter and they are in the same handwriting.

I have examined the original of Exhibit "B," and I find an erasure underneath the letter W in the southwest quarter of the entry of Edward Jenner Smith. I cannot say what was erased. The letter W appears to be in a different ink, and has a fresher and a newer appearance than the rest of the entry, and appears to be in a different handwriting.

I should say that all of the original of Exhibit "B," except the substituted letter "W" and the entry of A. C. Widdicombe, appear to be in the same handwriting.

The figures 7,417, 7,418, and 14,513, in the east half northeast quarter of the original of Exhibit "A" show great age, but the figures 14,513, in the southwest quarter, do not show great age.

In the original of Exhibit "B," relating to the entries of Smith and Wooden, the handwriting shows great age, except the substituted letter "W," which does not show great age. The erasure, and substituted of letter "W," is apparent to my naked eye. The "W" appears much fresher than the rest of the entry, and has been written since the rest of the entry.

DEPOSITION OF W. L. STEPHENS.

(Record, 80–1.)

My age is twenty-seven years; am cashier of the Central National Bank, of Boonville; reside at Boonville.—[The same in substance as the testimony of Dunnica.]

DEFENDANTS' CHAIN OF TITLE.

(Record, 82 to 89.)

A deed of Edward Jenner Smith to John D. Smith, dated Nov. 6th, 1837, duly acknowledged and recorded in Clark county, Missouri, with general covenants of warranty, conveying, among others, southeast quarter of second 36, township 64, range 6.

Will of John D. Smith, dated Dec. 8th, 1837, duly probated and filed for record in Clark county, May 11th, 1839, devising all land in Clark county, Mo., including southeast quarter of section 36, to Flora C. Byrne, Mary Conway Buck, and James Haslet, such land to be divided by the executors, James Smith and James Haslet.

Deed of James Smith and James Haslet, executors, under above-named will dividing said real estate in Missouri, and conveying to Mary C. Buck, among other, the southeast quarter of section 36, township 64, range 6, dated May 10th, 1839, and duly acknowledged and recorded in Clark county, Mo.

Deed of Mary C. Buck to Theodore Iungherr, with covenants of warranty, Sept. 18th, 1850, duly acknowledged and recorded in Clarke county, Mo., conveying, among other lands, southeast quarter said section 36.

Power of attorney, L. A. Iungherr, Sallie F. Johnstone, and H. Will Johnstone, her husband, to B. F. Hagerman, duly acknowledged and recorded, authorized him to sell said land, dated April 15th, 1870.

Deed of Lucretia A. Iungherr, Sallie F. Johnstone, and H. Will Johnstone, her husband, by B. F. Hagerman, attorney-in-fact, 35 acres off of said southeast quarter of section 36, to E. Pratt Buell and John Fallon, dated December 29th, 1874, with covenants of warranty, duly acknowledged and recorded in Clark county, Mo.

Deed of Lucretia Iungherr, Sallie F. Johnstone, and H. Will Johnstone, by B. F. Hagerman, attorney-in-fact, for remainder of said southeast quarter, to John W. and Samuel McKee, with covenants of general warranty, duly acknowledged and recorded in Clark county, Mo.

A certified copy of order of county court of Clark county, made February 7th, 1851, for the clerk to procure from land office at Palmyra the map of all taxable land. Another order of said court, dated December 17th, 1851, to procure field notes from said land office of all surveys in Clark county, and another order to the same effect, dated February 5th, 1852, and an order dated November 4th, 1852, showing that field notes were procured, and issuing warrant for payment of the same.

DEPOSITION OF JOHN P. HAMPTON. (Record, 91.)

My age is forty-nine years. I was deputy county and circuit clerk of Clark county from 1844 to 1850; county clerk from 1850 to 1856, and circuit clerk from 1856 to 1862.

Map shown witness, who says it was made out by L. P.

Halleck, United States register of lands at Palmyra, in 1851, and was procured by me from him under order of the county. At the time it was made out it contained taxable lands. It is much defaced now. It was certified by Halleck officially to be a correct list of taxable lands in Clark county. The part of the map southeast quarter of section 36, township 64, range 6, is now badly defaced so you cannot see the names on it. I am positive it was certified as taxable land when first received by me.

DEPOSITION OF CHARLES HENSHAW. (Record, 92.)

I live in Alexandria, Clark county, Mo. I came to Clark county in 1836. I resided first at Barnesville. Moved to Gregory's landing in 1843 and resided there until 1845 or 1846; was absent some time, and then resided in Alexandria, where I have lived since 1851. Gregory's landing joins the southeast quarter of section 36, township 64, range 6, and Alexandria is about six miles from it. Barnesville is about four miles from it. I have known said southeast quarter since 1838 or 1839. I knew Edward Jenner Smith in 1837 and up to 1839. The southeast quarter was known as the Smith entry by all the people of the neighborhood, and has continued to be so known. Smith's heirs claimed and exercised ownership over the land, and this fact was generally known in the neighborhood. The southwest quarter of section 36 was known as the Wooden entry. Wooden lived in the neighborhood of the land, but Smith lived four or five miles from the land. There never was any conflict between Wooden and Smith as to the ownership of the southwest quarter.

DEPOSITION OF J. B. WOODEN. (Record, 93.)

Childers is only in possession of fifteen acres of the southeast quarter. I am grandson of Robert Wooden, who owned the southwest quarter of section 36; it was divided among the heirs of Robert Wooden and is now partially owned by some of them.

DEPOSITION OF JAMES CROOKS. (Record, 93.)

I have lived in Missouri since 1829; up to 1852 within fifteen miles of said southeast quarter of section 36; since 1852 I have resided adjoining it. I married a daughter of Robert Wooden. I knew Edward Jenner Smith and Robert Wooden ever since they came to the country, and until their death. The general understanding of the people in the neighborhood was that southeast quarter was the Smith entry and southwest quarter was the Wooden entry. There was never any conflict between Smith and Wooden over the ownership of southwest quarter of section 36. The Wooden heirs exercised ownership over the southwest quarter and the Smith heirs over the southeast quarter.

DEPOSITION OF O. F. ENSIGN. (Record, 94).

Am at present surveyor of Clark county, Mo.; was sheriff and collector of said county from 1856 to 1860. In 1856 the said southeast quarter was assessed to Mrs. M. C. Buck and the taxes paid to me in her name, and in the years 1857, 1858, and 1859 it was assessed to Theodore Iungherr and the taxes paid to me in that name by B. F. Hagerman, I think.

DEPOSITION OF JOHN LANGFORD. (Record, 95).

Was sheriff and collector of Clark county from 1850 to 1854. In 1851 the said southeast quarter was assessed to John Buck and the taxes paid by B. F. Hagerman, his agent. I saw the map referred to by Hampton in 1857, when I became county clerk. I have examined the map often to see whether there were any vacant lands in the county, and know that southeast quarter of section 36 was not vacant. The map was regularly certified by Halleck.

DEPOSITION OF THOS. E. PALMER. (Record, 95 and 96.)

I am recorder of deeds of Clark county. The map referred to by Langford and Hampton is in my possession, but is much defaced. The southeast quarter of section 36 is now so obliterated that I can't tell anything about the original entries. There is a piece torn out of the lower right-hand corner on first page, township 64 and 65, range 5. As assessor of Clark county from 1852 to 1863 I assessed the said southeast quarter in 1856 to Mrs. Mary C. Buck; after that, in 1860, 1861, and 1862, it was assessed to Theodore Iungherr, and my impression is that in the years 1857, 1858, and 1859, to Theodore Iungherr.

DEPOSITION OF H. M. HILLER. (Record, 96, 97, and 98.)

I have lived in Clark county 21 years; was circuit clerk and *ex officio* recorder of deeds for Clark county from April, 1865, to December 31st, 1870. At the time I became recorder there was in the office a plat book which had been sent from the United States land office at Palmyra, which was

the only evidence in any of the offices of Clark county, Mo., of the original entries of lands, and my recollection is that it was regularly certified to by the register of lands. The map is a book made of muslin pages and the paper pasted on it. Formerly these pages were stitched together, but now they are separated, no two being together. The map at present is so defaced on southeast quarter of section 36, township 64, range 6, that the same is not legible. About the close of my term of office I assisted in making an abstract of the titles to real estate in Clark county, and in making the abstract I resorted to and used the map as the source of title and to show entries. The plat book or map at that time showed that E. J. Smith had entered the southeast quarter of section 36, and Robert Wooden the southwest quarter of section 36. My reasons for this are that in making up my abstract I was very careful to have the entries all correct. I copied the original entries into my abstract book myself, and after I had done so I had them called off, section by section, so as to correct any errors, if any were made, and that my book, as made up in 1870, shows the land to have been entered by E. J. Smith, and my only source of information was the plat book. If the southwest quarter had shown a double entry I would have known it, and the abstract would have shown it. If there had been a double entry it would have been a very unusual circumstance, and I would certainly remember it.

Witness shown Exhibit "A" with his deposition, being the plat, and says on comparing it the entries on the plat so far as they are made up, are the same as shown by the sheets of the map wherever they are legible.

ALEXANDER W. RUSH (Record 99, 101) testified:

In the year 1858 I was register of the land office at Palmyra, Mo. [A book was here shown witness, and he testified as follows:] This book is in my handwriting; I made it while register of said land office for Mr. Joseph R. Winchell. The certificate thereto was made by me at the time it bears date. This book, at the time it was made, was a copy of the entries then on the books in the register's office.

The certificate read in evidence as follows:

REGISTER'S OFFICE, PALMYRA, *Sept.* 14, 1858.

I hereby certify that the foregoing is correctly copied from the tract books and records of this office.

A. W. RUSH,
Register.

The book, page 180, read in evidence, showing west half and west half northeast quarter—400 acres—entered by Robert Wooden, November 8, 1834, and east half northeast and southeast quarter—240 acres—by Edward Jenner Smith, July 6, 1836—the Smith entry immediately under the Wooden entry.

Witness continues:

A plat marked Exhibit "A," with H. M. Hiller's deposition was here shown witness, and he said: "This plat is in the handwriting of Wm. Wright, a former register of the land office at Palmyra, Mo."

Col. BENJAMIN DAVIES (Record, 101) testified:

I was acquainted with Wm. Wright in his lifetime, and succeeded him as register of lands; think I know his hand-

writing; believe Exhibit "A" with Hiller's testimony to be his handwriting. [Here plaintiff admitted said Exhibit "A" to be in Wm. Wright's handwriting].

Defendants here introduced said Exhibit "A" with Hiller's deposition. (Record, 100-101.)

THOMAS E. HATCHER. (Record, 101.)

I last saw Wm. Wright in St. Louis about 1851. He ceased to be register about 1841. He left here about 1844. He is dead.

SAMUEL M'KEE. (Record, 103–104.)

I reside at Keokuk, Iowa. Myself and John McKee purchased 125 acres of the said southeast quarter of Mrs. Iungherr and Mrs. Johnstone, through B. F. Hagerman, at $20 per acre. Possession was given to us by Mr. Hagerman. Childers was in possession of only about fifteen acres of the ground when this suit was commenced. After this suit was brought against Childers, I informed Mr. Hagerman, agent for our grantors and warrantors, and he promised, on behalf of them, that they would defend it. I notified Childers that these parties represented by Mr. Hagerman would defend the suit for us and for him. He said that was all right. He was never authorized by us to consent to judgment. The plaintiff was on the land, so Mr. Childers told me, several times; but the plaintiff always avoided seeing me or John W. McKee, and was also in Keokuk several times, but never came to see us. The time when plaintiff was upon the land was after Childer's tenancy began. Childers told me that the plaintiff would go around among the wood-choppers, who were working for us, and notify them to quit chopping.

JOHN W. M'KEE. (Record, 105–106.)

[Same as Samuel McKee], and further, that at the time suit was brought it was a notorious fact that we were in possession of said southeast quarter of section 36, and were exercising acts of ownership over it, and we were daily upon the land, one or the other of us. We never heard of plaintiff's claim to the land until after we had taken possession and been to work some time on the land.

Defendants offered copy of agricultural college scrip and endorsements thereon.

Defendants offered in evidence letters A B and C D, certified to from the Department of the Interior, relating to the exclusion of the plaintiff from practicing before that department, which were excluded by the court on plaintiff's objection, to which the defendants at the time excepted.

Defendants read in evidence the instructions of the General Land Office relating to lands withheld from market.

Defendants also exhibited in evidence the plat of land under fence and in possession of Childers, in said southeast quarter of section 36, amounting to $14\frac{83}{100}$ acres.

B. F. HAGERMAN (Record, 112, 113) testified:

I lived at Alexandria, Clark county, Mo., from 1848 to 1864. I was agent of Mrs. M. C. Buck for the said southeast quarter of section 36 in 1851, and paid taxes on same for her until she sold to Theodore Iungherr. After the sale to Mr. Iungherr I became his agent for said southeast quarter and paid taxes for him until his death. He left no will. He left the defendant, Mrs. L. A. Iungherr, his widow, and defendant, Sallie F. Johnstone, his daughter and only child.

After his death I became the agent of Mrs. Iungherr and her daughter for said land until they sold it, and paid taxes for them during the time they owned it. This land was about six miles from Alexandria. I exercised control over it during the time I was agent for it, for the above-named parties, by paying taxes upon it, by protecting it from trespassers, and by selling some timber off of it. It was generally known in the neighborhood as the Smith entry, and afterwards as the Buck land, and then as the Iungherr land. The land was not in cultivation until after McKees bought it, when they put a portion of it in cultivation through the defendant Childers. This land was worth, in 1871, fifteen dollars per acre. I was acquainted with its value at that time. During the time I was agent for the land I saw the map or plat on file with the county clerk, referred to in the testimony of John P. Hampton. The words E. J. Smith were written on the southeast quarter of section 36, township 64, range 6, on said map or plat. I examined it frequently and copied it off three or four times. Since I have known this land no one else has ever claimed it until Widdicombe set up a claim to it. After this suit was brought I wrote to Mrs. Buck for all the papers she had relating to it. She sent me the following papers, which I now produce, to wit: A plat of said southeast quarter and other lands, attached to H. M. Hiller's deposition as Exhibit "A," and two certificates of redemption of this and other lands from the State register (Missouri) for the years 1847, 1848, and 1850, which are in words and figures as follows:

[Here follows said certificates, but it is unnecessary to set them out further.]

See Record, 113 and 114.

DECLARATIONS OF LAW.

The circuit court on its own motion, pursuant to a practice authorized by the laws of Missouri, declared the law to be as set out in Record, page 131.

STATEMENT.

This is a suit in ejectment to recover 160 acres of land, southeast quarter of section 36, township 64, range 6, Clark county, Mo.

The answer sets up an equitable defense and asks affirmative equitable relief.

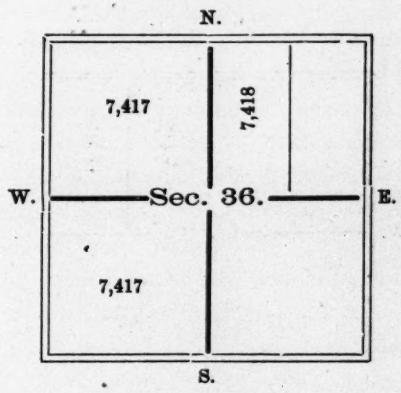
The court below gave judgment for the defendants and the plaintiff appeals. The issues tried were presented on the answer and the replication thereto. The answer states clearly the defense and the Court is asked to read it (Record, pages 23 to 31.) The decree (Record, pages 38 to 41) specifically finds the facts and is unquestionably supported by the testimony, and the attention of the Court is specially directed to it.

The main facts briefly stated are:

In 1834 the United States land office was located at Palmyra, Mo., and William Wright was register thereof. Cash sales of land in Clark county, Mo., were being made. On November 8, 1834, Robert Wooden went personally to the land office and purchased the west half and the west half of the northeast quarter of said section 36. The applications were written out personally by the register and signed by Wooden, who paid the money for the land. The register then entered the current numbers of Wooden's entry on the

plat book and stated the sales upon the tract book. After Wooden's entries Edward Jenner Smith, under whom the defendants claim, went to Palmyra, personally, on July 6, 1836, and bought the southeast quarter and east half of the northwest quarter of said section 36, being all the land remaining in that section. At this time William Wright was still register. He and Edward Jenner Smith looked at the plat and tract book of section 36, which were as follows:

PLAT BOOK.



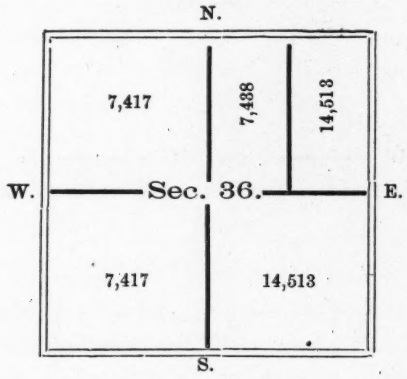
TRACT BOOK.

	Section.	Township.	Range.	Quantity. Acres.	Quantity. 100ths.	To whom sold.	Residence.	When sold.
	36	64	6	640				
W. ½	...	...	...	320	.....	Robert Wooden.	Lewis county, Mo.	November 8, 1834.
W. ½ N. E. ¼	...	...	...	80	.....	" "	" "	" "

These showed that there was for sale the southeast quarter and east half of the northeast quarter of section 36, and that the rest had been previously sold to Wooden. The numbers 7,417 and 7,418 on the plat book are the numbers of Wooden's entries.

William Wright, having sold to Edward Jenner Smith the southeast quarter and the east half of the northeast quarter of said section, made entries in his own handwriting to that effect on the plat book and tract book, the books of original entry, and thereupon the books showed as follows :

PLAT BOOK.



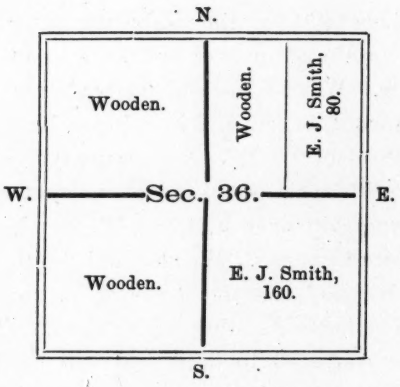
TRACT BOOK.

	Section.	Township.	Range.	Quantity. Acres.	Quantity. 100ths.	To whom sold.	Residence.	When sold.
	36	64	6	640				
West half.....				320	.....	Robert Wooden.	Lewis County, Mo	November 8, 1834.
West ½ N. E. ¼...				80	.....	" "	" " "	" " "
E. ½ N. E. & S. E...				240	.....	E. Jenner Smith.	" " "	July 6, 1836.

The numbers 14,513 on the southeast quarter and the east half of the northeast quarter are the current numbers of Smith's entry. Wright, the register, wrote out the application of Edward J. Smith, and in doing so by mistake wrote "S. W." instead of "S. E." Neither party discovered this mistake. Smith took possession of the southeast quarter, assumed ownership over it, while Wooden had possession of the southwest quarter. Wooden and Smith lived in the same neighborhood, and there was never any conflict between them or those claiming under them. The southeast quarter was conveyed by deeds and will, until defendants became the owners of it, and State and county taxes have been levied upon and paid by the owners for the last thirty or forty years.

A certified copy of plat and tract books obtained in 1851 from the land office at Palmyra, and kept among the records of Clark county, as evidence of source of title, showed that Smith had entered the southeast quarter and Wooden the southwest quarter.

A certified copy of the tract book made out by A. W. Rush, register, for Joseph R. Winchell, in 1858, shows the same; and a plat introduced in evidence, in Wright's own handwriting, and made out by him in his lifetime, and while he was register, and probably the very day he sold to Smith, conclusively proves the same thing. This plat made out by Wright is as follows:



The plat and tract book have been fraudulently changed until now they are as set out on pages 49 and 50 and 147 of the Record.

The changes of these books from what they were as left by William Wright, register, are:

1st. The tract book has been changed by erasing "E" in southeast and substituting "W," making it appear that Edward Jenner Smith entered the southwest quarter, which had been previously entered by Wooden, instead of the southeast quarter, and below the entry of Wooden has been written the entry of Widdicombe of the southeast quarter; all of which will appear by foregoing copies of tract book, as it was and as it is.

2d. The plat has been changed by erasing the figures 14,513, the current number of Smith's entry on southeast quarter and putting them on southwest quarter under the figures 7,417, the current number of Wooden's entry; and by writing A. C. Scrip and No. 1,520, the current number of Widdicombe's entry, on the southeast quarter.

These changes are conclusively proved by the testimony and found by the court in its decree.

On the tract book as it now stands all the writing relating to Wooden's and Smith's entries are in the same handwriting, except the substituted "W" which has been written after S, where it formerly was S. E.

On the plat as it now stands the numbers 7,417, 7,418, and 14,513 on the east half of the northeast quarter are in the same handwriting, and the number 14,513 on the southwest quarter and the A. C. Scrip and No. 1,520 on the southeast quarter are in another and different handwriting.

In this connection we ask the Court to read the testimony of Gott, receiver, at the time of Widdicombe's entry.

It further appears that the writing on the plat A. C. Scrip No. 1,520 is not in the handwriting of the register at the time same should have been made.

See Gott's testimony. The changes in the plat and tract book were perfectly apparent to the naked eye, and the plaintiff, who is perfectly familiar with the records, knew how the records originally stood and that there was no authority to change them, and such authority, if any, had not been exercised, if, indeed, as the testimony seems to indicate, he was not actually guilty by personal complicity in the fraudulent alterations.

In the language of the decree of the State circuit court: "With these facts before his eyes, it would suggest itself to him that one of two state of facts must exist: either, first, that the register had sold the southwest quarter twice—once to Wooden and again to Smith, and had by mistake entered on his tract book and plat the sale to Smith of the southeast quarter instead of the southwest quarter—or, he had in fact

sold the southeast quarter to Smith and entered the memorandum of sale on his tract book and plat correctly, but made the mistake in the application, and that the original entry had been erased and altered contrary to the facts. These facts in connection with the other circumstances proved, were sufficient to have put him, as a conscientious and prudent man, on inquiry, and if he had gone to the locality of the land, he would have learned that at all times, since the entry in 1836, Smith and those under him, had claimed to own the southeast quarter, and had never set up any claim to the southwest quarter which was claimed by Wooden."

So there can be no doubt that the only title the plaintiff had to the land, was a bare legal title, and the equitable title was in defendants and those claiming under them.

The opinion of the supreme court of Missouri, affirming the decree of the trial court is set out in full in the record, pp. 138 to 150 inclusive. We ask the court to read it. We present it as our argument. It is clear and convincing, and stands to day and we believe will long stand as a leading case, showing the power of a court of equity to protect the possessions of the citizens against fraud, intrigue and chicanery.

BRIEF.

I.

THERE IS NO FEDERAL QUESTION PRESENTED BY THIS RECORD, BUT ONLY ONE OF GENERAL EQUITABLE JURISPRUDENCE, AND THEREFORE THE APPEAL SHOULD BE DISMISSED.

The State court gave effect to the plaintiff's patent by holding that he thereby acquired the legal title to the quarter section of land in controversy, but that he acquired such title under such circumstances that he held it in trust for the defendants and those claiming under them. The only questions decided and on which the case turned in the court below were that Edward Jenner Smith, under whom the defendants claim title, purchased the *southeast* quarter section 36 at the land office at Palmyra, Mo., and paid for same; that the register of the land office, by mistake in writing the formal application for Smith, inserted therein S. *W.* instead of S. *E.;* that Smith intended to buy and the register of the land office intended to sell the *S. E.*, which only could be sold, the *S. W.* having already been sold, and that when the plaintiff acquired the legal title to the land he actually and positively knew that Smith had previously purchased and paid for the same, or he knew of such facts as would have put an *honest and prudent* man on inquiry which would have led to knowledge of Smith's equitable title.

There is no rule of equity more firmly settled than that he who acquires the legal title to land from one person, knowing that the equitable title belongs to another, acquires the legal title in trust for the owner of the equitable

title, and equity will decree the legal title to the beneficial owner.

We are sure this Court will, if it considered this case on its merits, assert this doctrine in all its vigor.

In our view, the question is one of general equity jurisprudence and not a Federal question within the meaning of the act of Congress allowing a review on appeal here of a decision of the highest court of a State.

The courts below, and we use the plural because this case was tried *de novo* in the supreme court, on a full hearing found that the register intended to sell and Smith intended to buy the *S. E.* quarter; and that by mutual mistake of the parties—that is, by mistake of the register in writing out the formal application as for *S. W.* and by mistake of Smith in not discovering the clerical error made by the register—the formal application was not corrected; that the register actually sold and Smith actually bought and paid for the *S. E.*, and that when plaintiff acquired his patent he knew, or ought to have known, that Smith and those claiming under him were in equity the owners of the land. We submit that these findings cannot be reviewed here.

Chicago & Detroit R. R. *vs.* Wiggins Ferry Co., 119 U. S., 624.

Williams *vs.* Weaver, 100 U. S. 547.

II.

IF, HOWEVER, THIS COURT SHOULD REVIEW THIS CASE HERE ON ITS MERITS, WE ARE CONFIDENT ONLY ONE RESULT CAN BE REACHED AND THAT AN AFFIRMANCE OF THE DECREE BELOW.

On the merits we are content to rest this case, when the

Court shall have read our answer as contained in the record, our evidence hereinbefore summarized, and the decree of the State circuit court wherein the facts are specifically found, and the able opinion of the supreme court of the State as found in the printed record.

The plaintiff relies on the legal title and the defendants on a prior equitable title.

Although the legal title is in the plaintiff, yet he holds same in trust for the equitable owners.

"A man who acquires, even for a valuable consideration, a legal title with the knowledge that it is affected by an equity, takes it subject to that equity." Story's Equity, section 395.

Bispham's Principles of Equity, section 262.

There is nothing conclusive in the patent as to the equitable rights to the land.

"After the title has passed from the Government to individuals and the question has become one of private rights, the jurisdiction of equity may be invoked to ascertain if the patentee does not hold in trust for other parties." Johnson *vs.* Towsley, 13 Wallace, 72.

See also to same effect—

Minnesota *vs.* Batchelder, 1 Wallace, 109.
Silver *vs.* Ladd, 7 Wallace, 219.
Stark *vs.* Starr, 6 Wallace, 402.
Carman *vs.* Johnson, 29 Missouri, 84.
Same case, 20 Missouri, 108.

This doctrine is recognized fully in the very cases cited in the plaintiff's brief.

The plaintiff, when he acquired the legal title, either knew absolutely of the equitable title, or he knew such facts as to put him on inquiry.

"Actual notice consists in direct information of a fact brought directly home to a party, or a knowledge of such circumstances which would lead him to a knowledge of such facts."

Bispham's Principles of Equity, section 268.
Story's Equity, 395, *et seq.*

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